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Forty-second session
Agenda item 10

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

QUESTION OF HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Working Group on Detention

Chairman: Mr. Louis Joinet

Rapporteur: Mr. Ribot Hatano

CONTENTS

		Paragraphs	Page
INTRODUCTION		1 - 9	1
I.	ADOPTION OF THE AGENDA	10 - 13	3
II.	UNACKNOWLEDGED DETENTION, ENFORCED AND INVOLUNTARY DISAPPEARANCE	14 - 19	3
III.	ANNUAL REVIEW OF DEVELOPMENTS CONCERNING THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT	20 - 31	4

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CONTENTS (continued)

		Paragraphs	Page
	A. Recent trends identified by non-governmental organizations	21 - 24	4
	B. Question of model legislation	25	5
	C. Treatment of persons subjected to detention or imprisonment	26	5
	D. Application of international standards concerning the human rights of juveniles subjected to any form of detention or imprisonment	27 - 28	6
	E. Information on the 8th Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August - 7 September 1990) and co-operation with the Vienna Committee	29	6
	F. Suggestions for next year's agenda	30 - 31	6
IV.	PRIVATIZATION OF PRISONS	32	7
V.	DEATH PENALTY, WITH SPECIAL REFERENCE TO ITS IMPOSITION ON PERSONS OF LESS THAN 18 YEARS OF AGE	33 - 39	7
	A. Persons of less than 18 years of age	33 - 35	7
	B. Treatment that may cause additional suffering	36 - 37	8
	C. Documentation required	38 - 40	8
VI.	RIGHT TO A FAIR TRIAL	41 - 49	8
VII.	PROVISIONAL AGENDA FOR THE NEXT SESSION	50 - 51	10
ANNEX			
	Draft Declaration on the protection of all persons from enforced or involuntary disappearance		11

INTRODUCTION

1. By resolution 7 (XXVII) of 20 August 1974, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to review every year the situation concerning the rights of persons subjected to any form of detention or imprisonment. At its forty-second session, the Sub-Commission decided to continue the practice of establishing a sessional Working Group on Detention. The existing regional groups nominated the following experts as members of the Working Group, and they were duly appointed by the Sub-Commission at its 2nd meeting, held on 7 August 1990: Mr. El Hadji Guissé (Africa), Mr. Ribot Hatano (Asia), Mr. Louis Joinet (Western Europe and other States), Mr. Eduardo Suescún Monroy (Latin America) and Mr. Danilo Türk (Eastern Europe).

2. The Working Group met on 13, 15, 17, 22 and 24 August 1990. The report of the Working Group was adopted unanimously at its 5th meeting on 24 August.

3. At the first meeting, the outgoing Chairman, Mr. Miguel Alfonso Martínez, suggested that, in accordance with its established practice, the Working Group elect its outgoing Rapporteur Chairman of its present session. The Working Group accordingly elected Mr. Louis Joinet Chairman. On a proposal by Mr. Eduardo Suescún Monroy, the Working Group elected Mr. Ribot Hatano Rapporteur.

4. The following members of the Sub-Commission, who are not members of the Working Group, also took part in the discussions: Mr. Miguel Alfonso Martínez (1st, 2nd, 3rd and 4th meetings), Mrs. Mary Concepción Bautista (4th meeting), Mr. Stanislav Chernichenko (5th meeting), Mr. Leandro Despouy (1st meeting), Mr. Cornelis Flinterman (alternate, 1st, 2nd, 3rd and 5th meetings), Mr. Waleed Sadi (alternate, 1st meeting), Mr. William W. Treat (4th and 5th meetings) and Mr. Yozo Yokota (3rd and 5th meetings).

5. The observer for the Government of the Netherlands also addressed the Group (4th meeting).

6. Statements were made by representatives of the following non-governmental organizations in consultative status with the Economic and Social Council: Amnesty International (3rd and 4th meetings), Andean Commission of Jurists (3rd meeting), American Association of Jurists (1st and 2nd meetings), International Commission of Jurists (1st, 3rd and 5th meetings), Defence for Children International (3rd and 4th meetings), Latin American Federation of Organizations of Relatives of Missing Detainees (1st and 3rd meetings).

7. Upon requests by the Chairman and Mr. Eduardo Suescún Monroy, the secretariat made statements at the 3rd meeting concerning existing international norms relating to the treatment of offenders and detained persons in jails, detention centres and other institutions, and concerning the documents and draft norms which will be presented at the 8th Congress on the Administration of Justice in Havana (27 August - 7 September 1990). At the 5th meeting, the secretariat described the procedure followed for submitting the various chapters of the draft report as and when they were ready for translation and reproduction.

8. The Working Group had before it the following documents submitted under item 10 of the Sub-Commission's agenda:

Report of the Secretary-General containing information received from Governments pursuant to Sub-Commission resolution 7 (XXVII) of 20 August 1974 (E/CN.4/Sub.2/1990/20);

Report of the Secretary-General containing information submitted by specialized agencies and intergovernmental organizations pursuant to Sub-Commission resolution 7 (XXVII) of 20 August 1974 (E/CN.4/Sub.2/1990/21);

Synopsis of material received from non-governmental organizations in consultative status with the Economic and Social Council prepared by the Secretariat (E/CN.4/Sub.2/1990/22);

Report of the Secretary-General on succinct information on developments in the human rights programme and on the activities within the United Nations programme on crime prevention and control as they relate to the question of human rights of persons subjected to any form of detention or imprisonment (E/CN.4/Sub.2/1990/23);

Report of the Secretary-General on the application of international standards concerning the human rights of detained juveniles prepared pursuant to Sub-Commission resolution 1989/31 (E/CN.4/Sub.2/1990/25 and Add.1 and 2);

Report of the Secretary-General on the application of the death penalty to persons under 18 years of age prepared pursuant to Sub-Commission resolution 1989/32 (E/CN.4/Sub.2/1990/26 and Add.1 and 2);

Report of the Secretary-General on comments submitted by Governments and specialized agencies pursuant to General Assembly resolution 44/162 of 15 December 1989, entitled "Human Rights in the administration of justice" (E/CN.4/Sub.2/1990/27);

Working paper presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37, on the question of human rights and states of emergency (E/CN.4/Sub.2/1990/33 and Add.1);

Brief report prepared by Mr. Stanislav Chernichenko and Mr. William Treat in accordance with resolution 1989/27 of the Sub-Commission, concerning the right to a fair trial (E/CN.4/Sub.2/1990/34);

Written statement submitted by the American Association of Jurists, a non-governmental organization in consultative status, containing comments on the latest version of the draft declaration on enforced or involuntary disappearances (Category II) (E/CN.4/Sub.2/1990/NGO/1);

Report of the Working Group on Detention (E/CN.4/Sub.2/1989/29/Rev.1);

General Assembly resolution 41/120, "Setting international standards in the field of human rights".

9. The Working Group also had before it the following documents:

Provisional agenda (E/CN.4/Sub.2/1990/WG.1/L.1);

Note by the Secretary-General containing a revised version of the draft declaration on the protection of persons from enforced or involuntary disappearance (E/CN.4/Sub.2/1990/CRP.1/Rev.1);

Selected United Nations draft instruments relating to the administration of justice and the human rights of detainees which will be submitted to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to be held at Havana (27 August - 7 September 1990) (E/CN.4/Sub.2/1990/CRP.2).

I. ADOPTION OF THE AGENDA

10. At its 1st meeting, the Working Group considered the provisional agenda proposed at its 1989 session (cf. E/CN.4/Sub.2/1989/29/Rev.1, para. 50):

(a) Unacknowledged detention, enforced and involuntary disappearance;

(b) Annual review of developments concerning the human rights of persons subjected to any form of detention or imprisonemnt;

(c) Privatization of prisons;

(d) Death penalty, with special reference to its imposition on persons of less than 18 years of age; and

(e) Right to a fair trial.

11. At the same meeting, the Chairman suggested that the Working Group first review the provisional agenda, in order to decide on the items which it would consider in 1990, and those which would be proposed in 1991.

12. Since the adoption of the agenda was dependent upon the decision of the Working Group on whether substantive issues relating to the draft declaration on the protection of all persons from enforced and involuntary disappearance should be discussed or whether discussion should be confined only to drafting improvements, the Chairman opened the discussion to preliminary statements on item 1 of the provisional agenda.

13. The agenda was adopted at the 3rd meeting, on 17 August 1990, as it appears in paragraph 9 above and in document E/CN.4/Sub.2/1990/WG.1/L.1.

II. UNACKNOWLEDGED DETENTION, ENFORCED AND INVOLUNTARY DISAPPEARANCE

(agenda item 1)

14. The Working Group considered this item at its 1st, 2nd and 3rd meetings, on 13, 15 and 17 August 1990, discussing the revised draft declaration on the protection of all persons from enforced or involuntary disappearance.

READEX FICHE

15. The Chairman recalled that the outgoing Chairman had received a mandate from the Working Group to prepare a revised version of the declaration, taking greater account of the suggestions made at many earlier meetings, especially at the Meeting of Experts held at the Palais des Nations from 21 to 23 March 1990, on the initiative of the International Commission of Jurists, in which some members of the Working Group, some government observers and several non-governmental organizations, in particular, Amnesty International, the International Federation of Human Rights and the Latin American Federation of Associations of Relatives of Disappeared Detainees, actively participated, with a view to facilitating a consensus.

16. In almost all of their statements, the participants, and particularly the members of the Working Group, spoke in favour of adoption by consensus at the present session, subject to some improvements in form.

17. It was decided that Mr. Miguel Alfonso Martínez, in liaison with Mr. Ribot Hatano, Rapporteur, would make the necessary contacts to arrange for the requisite corrections and facilitate, at the 2nd meeting, adoption by consensus on the basis of the draft submitted to the Working Group.

18. At the second meeting, the Chairman gave the floor to Mr. Miguel Alfonso Martínez, who informed the Working Group of the results of his informal discussions and read out his technical amendments to the draft declaration contained in document E/CN.4/Sub.2/1990/CRP.1.

19. Other suggestions for improvements in form were put forward by the participants. The Chairman having noted agreement on the need for a final editorial revision, the Working Group gave the Chairman, the Rapporteur and Mr. Alfonso Martínez, in consultation with the Secretariat, a mandate to put the draft declaration in final form. The Chairman noted that there was consensus and the Working Group then unanimously adopted the text contained in annex I below.

III. ANNUAL REVIEW OF DEVELOPMENTS CONCERNING THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

(agenda item 2)

20. At its 3rd meeting, the Working Group started consideration of item 2. The Chairman opened the debate for discussion of new developments in the field, including an oral report by Mr. El Hadji Guissé on trends appearing in the synopsis prepared by the secretariat of information received from non-governmental organizations in consultative status with the Economic and Social Council (E/CN.4/Sub.2/1990/22) in order to identify specific suggestions concerning future work to be taken into consideration in the draft agenda for next year.

A. Recent trends identified by non-governmental organizations

21. Mr. El Hadji Guissé stressed that, according to the information available in the synopsis, it is during the period of detention by the police that most violations of the human rights of persons subjected to detention occur. He also noted that, in many countries, the death penalty increasingly applies to juveniles under 18 years of age. He stated, regarding the death penalty in general, that people are often executed for having expressed an opposing

political opinion. In addition, he emphasized that cruel treatments are increasingly inflicted on detained persons. He pointed out that by the time detained persons are released, they are often disabled or physically mutilated. In this respect, he mentioned particularly vulnerable groups such as women and children. He praised the role of non-governmental organizations (NGOs) in furnishing the members of the Working Group and the Sub-Commission with information concerning violations of the human rights of detained persons. However, he expressed the view that the reality of the situation was even worse than the description contained in the synopsis, and that NGOs should continue to research and analyse the situation further. The Chairman thanked Mr. El Hadji Guissé and suggested that a member of the Working Group should be asked, every year, to report on the trends and situations identified in the synopsis.

22. At its 5th meeting, the Working Group decided to entrust this task to Mr. El Hadji Guissé and Mr. Cornelis Flinterman.

23. The representative of Amnesty International expressed the view that habeas corpus should be considered as a non-derogable right, basing this view, inter alia, on an advisory opinion of the Inter-American Court of Human Rights. This view was supported by Mr. El Hadji Guissé and Mr. Cornelis Flinterman, as well as by the representative of the International Federation of Human Rights. The representative of the International Commission of Jurists and the Andean Commission of Jurists suggested that one of the members of the Working Group prepare a working paper on habeas corpus as a non-derogable right.

24. At its 5th meeting, the Working Group decided to entrust this task jointly to Mr. John Carey (alternate of Mr. William Treat) with regard to the habeas corpus procedure, and to Mr. Eduardo Suescún Monroy with regard to the amparo procedure.

B. Question of model legislation

25. Mr. Cornelis Flinterman, referring to Commission on Human Rights resolution 1990/81 and to document E/CN.4/Sub.2/1990/27, proposed to elaborate texts for national model legislation in the field of the administration of justice. He suggested that one member of the Working Group of the Sub-Commission consider elements of model texts and write a working paper where model legislation could be indicated. Furthermore, he proposed to ask Mr. William Treat and Mr. Stanislav Chernichenko to include model legislation into their study on the right to a fair trial. Mr. El Hadji Guissé pointed out that the search for model legislation could encounter many problems. In his opinion, it would be more appropriate to conduct a survey of all model elements and to present it to the members of the Working Group as a source of information to be taken into consideration by Governments, but not as model legislation. Mr. Louis Joinet agreed with Mr. El Hadji Guissé and expressed the view that the Working Group should develop principles rather than draft models.

C. Treatment of persons subjected to detention or imprisonment

26. Mr. Eduardo Suescún Monroy suggested that, when the study of habeas corpus is completed, the Working Group should consider the conditions in detention centres and prisons in order to see how institutions of detention

really work. Mr. Yozo Yokota supported this suggestion, noting that developing countries had difficulties in improving the physical conditions of facilities and institutions for detention or imprisonment due to lack or shortage of funds. He stressed the importance of financial and technical assistance for improving such conditions. Mr. Miguel Alfonso Martínez agreed with him and supported the suggestion.

D. Application of international standards concerning the human rights of juveniles subjected to any form of detention or imprisonment

27. Ms. Mary Concepción Bautista explained that in her report, not yet available for the Sub-Commission, on the application of international standards concerning the human rights of juveniles subjected to any form of detention or imprisonment (E/CN.4/Sub.2/1990/28), she suggested, inter alia, that the conditions of detention or imprisonment of juveniles be improved and that a system of continuous visits in gaols be established.

28. The representative of Defence for Children International emphasized that, according to international human rights law, the most important right of every child is the right to special protection, including, inter alia, the rights not to be tried as an adult and not to be held responsible at all before reaching a certain age. He stressed the need for special courts or procedures for juvenile offenders, as recognized by the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Standard Minimum Rules for the Administration of Juvenile Justice. He mentioned the situation in Bangladesh, Bolivia, Canada, Pakistan, the Philippines and the United Kingdom. He suggested that the Working Group consider again the question of juvenile justice next year.

E. Information on the 8th Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August-7 September 1990) and co-operation with the Vienna Committee

29. The secretariat informed the Working Group of the activities within the United Nations programme, as well as on the relevant programme, documents and draft instruments of the Havana Congress (E/CN.4/Sub.2/1990/23; E/CN.4/Sub.2/1990/CRP.2; see also para. 7 above) on crime prevention and control. The Chairman, referring to the problem of co-ordination between the Working Group and the Vienna Committee, proposed that the secretariat contact the Crime Prevention Branch so that a representative of the Branch might be heard next year on this question.

F. Suggestions for next year's agenda

30. Following the suggestions made at the beginning of consideration of agenda item 2 (see para. 18 above), at the 3rd meeting the Chairman listed the propositions so far mentioned for next year's agenda as follows:

(a) Habeas corpus;

(b) Model legislation;

(c) Abuse of preventive detention;

(d) Incommunicado detention;

(e) Juvenile justice;

(f) Treatment of detained or imprisoned persons;

(g) Improvement of the physical conditions of prisons and detention facilities and technical and financial assistance therefore;

(h) Individualization of punishment and crime;

(i) Autopsies of persons having deceased during detention;

(j) Investigation in penal cases;

(k) Impunity of perpetrators of disappearances.

31. The Chairman suggested that non-governmental organizations consider a priority list of the above-mentioned items for next year, since the Working Group would not be able to discuss all of them for lack of time.

IV. PRIVATIZATION OF PRISONS

(agenda item 3)

32. Last year, Mr. Miguel Alfonso Martínez agreed to prepare a working paper dealing with the privatization of prisons. For lack of assistance and time, he has not been able to prepare it this year and, upon his suggestion, this item was postponed until next year.

V. DEATH PENALTY, WITH SPECIAL REFERENCE TO ITS IMPOSITION ON PERSONS OF LESS THAN 18 YEARS OF AGE

(agenda item 4)

A. Persons of less than 18 years of age

33. The Working Group took up, at its 4th meeting, the question of the imposition of the death penalty, particularly on persons of less than 18 years of age. The representative of Amnesty International said that his organization had already provided the Working Group with information on the subject in 1989 (E/CN.4/Sub.2/1989/29/Rev.1, para. 45, and annex V). In Amnesty International's view, this practice violated the international norms that were applicable in this field. Amnesty International had expressed its satisfaction at the adoption by the Sub-Commission of resolution 1989/33 in which the Sub-Commission appealed to Member States to stop this practice, but it expressed its deep concern at the reports on the subject which it had received in 1989 regarding the following countries: Barbados, Iran, Nigeria, Saint Vincent and the Grenadines, Union of Myanmar and United States of America. Amnesty International therefore hoped that the Working Group would keep the question on its agenda in 1991.

34. Mr. Miguel Alfonso Martínez supported that suggestion and said that the question, which concerned several countries, would also be discussed at the Havana Congress.

35. Mr. Eduardo Suescún Monroy expressed the hope that the Sub-Commission would recommend that the death penalty should be abolished in the case of persons of less than 18 years of age and that it should be commuted in cases where sentence had been pronounced.

B. Treatment that may cause additional suffering

36. The observer for the Netherlands drew the Working Group's attention to her Government's suggestion in document E/CN.4/Sub.2/1990/27, on the subject of the implementation of norms applicable in the field of administration of justice, that the Working Group should consider rule 9 of the Safeguards guaranteeing protection of the rights of those facing the death penalty. That rule provides that "Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering". The Netherlands Government wished to assess the types of treatment that might cause additional suffering. It pointed out that, in certain cases, long delay between final sentencing and execution of the sentence might constitute inhuman or degrading treatment. The observer for the Netherlands therefore suggested that the Working Group should consider the question in 1991. This suggestion was endorsed by Mr. El Hadji Guissé and Mr. Miguel Alfonso Martínez.

37. Mr. Eduardo Suescún Monroy considered that the question might be examined in conjunction with the study of the treatment of prisoners.

C. Documentation required

38. Mr. El Hadji Guissé briefly outlined the issues raised by imposition of the death penalty and pointed out that a study of the question would require considerable time. He thanked Amnesty International and the other non-governmental organizations which sent members of the Working Group reports on the question and asked them to provide fuller and more factual information to enable the Working Group to be as objective and juridical as possible.

39. It was agreed that the question of the imposition of the death penalty, particularly on persons of less than 18 years of age, should be included in the Working Group's 1991 provisional agenda. The secretariat would provide the Working Group in 1991 with information on the existing international norms and their application. At the suggestion of Mr. Miguel Alfonso Martínez, supported by Mr. Louis Joinet, the Working Group agreed that a member should be asked to submit in 1991 a brief document on world trends in that field. The member of the Working Group having to report on the synopsis of material received from non-governmental organizations would therefore not have to deal with that question.

40. At its 5th meeting, the Working Group decided to entrust this task to Mr. El Hadji Guissé.

VI. RIGHT TO A FAIR TRIAL

41. The Working Group considered this item of its agenda at its 5th meeting. At the invitation of the Working Group, Mr. Treat and Mr. Chernichenko briefly outlined what they considered to be the most important points of their report (E/CN.4/Sub.2/1990/34), in order to prepare for its discussion in plenary meeting.

42. Mr. Treat raised the question how one could arrive at an ultimate document that could serve as a model for legislation.

43. Mr. Chernichenko drew the attention of the Working Group to the fact that there were already a number of existing international standards that could serve as models to the appreciation of States and that could be compiled in a codex of internatinal standards concerning trial procedures.

44. Mr. Joinet expressed his remarks about the report on the right to a fair trial, including the question of whether or not to include this right among the intangible rights to which no derogation is authorized, including during states of emergency. He referred, in this respect, to the studies on states of emergency and human rights prepared by Ms. Nicole Questiaux and Mr. Leandro Despouy. In his view, the list of intangible rights should be limited to the hard core ("noyau dur") of human rights. If the right to a fair trial was to be thought of in this respect, may be only the essential principles of this right should be taken into consideration.

45. Mr. El Hadji Guissé expressed the view that a study on non-derogable minimum trial standards would demand a lengthy work and he invited all NGOs to contribute to this work.

46. Mr. Cornelis Flinterman suggested that the right to a fair trial, considered as a non-derogable right, might be the subject of an additional optional protocol to the International Covenant on Civil and Political Rights. At the present stage, he would prefer a set of principles rather than a declaration. He hoped that the aspects of the right to a fair trial relating to rights and obligations of a civil character, and aspects concerning administrative law, would be taken into consideration.

47. Mr. Yozo Yokota endorsed the objective of a long-term work referred to by previous speakers, considering it preferable not to adopt new international standards hastily. He suggested that an in-depth comparative study should be undertaken, in order to arrive at a universally accepted standard, thus supporting the suggestion made by Mr. Chernichenko and Mr. Treat in their report that a questionnaire should be sent to Governments and interested NGOs in consultative status with the Economic and Social Council. The questionnaire would cover not only existing standards, but also practice.

48. The representative of the International Commission of Jurists also endorsed the idea of a questionnaire. He emphasized that attention should be given to military courts and emergency courts, which rarely met the guarantees required by article 14 of the Covenant.

49. Mr. Louis Joinet agreed that an in-depth study was necessary; he preferred the idea of drafting guiding principles, which might later be used in a convention or protocol. He emphasized that the Commission on Human Rights had expressed the view that the Sub-Commission already sent out too many questionnaires. And in his own experience as Special Rapporteur, he had found that few replies to questionnaires were received from Governments. In his view, the questionnaire should initially be addressed to competent NGOs, in order that they might indicate the most relevant rules of procedure.

VII. PROVISIONAL AGENDA FOR THE NEXT SESSION

50. At the 4th meeting, the Chairman recalled the suggestions made at the 3rd meeting regarding the items which might be included in the agenda of the Sessional Working Group on Detnetion which the Sub-Commission might decide to convene at its forty-third session. He emphasized that these items were suggestions only and that the provisional agenda remained open for discussion.

51. At its 5th meeting, the Working Group adopted the following provisional agenda for the next session:

1. Election of a Chairman and a Rapporteur

2. Adoption of the agenda

3. Annual review of developments concerning the human rights of persons subjected to any form of detention or imprisonment

4. Privatization of prisons

5. The death penalty, with special reference to its imposition on persons of less than 18 years of age

6. Habeas corpus, as a non-derogable right

7. Juvenile justice

8. Subsidiary list of questions for possible consideration:

   (a) Model legislation on detention

   (b) Forms of abuse of preventive detention and remedial measures

   (c) Detention in solitary confinement or incommunicado and human rights

   (d) Treatment of persons subjected to any form of detention or imprisonment

   (e) Improvement of the physical conditions of prisons and detention facilities and technical and financial assistance therefore

   (f) Individualization of proceedings and punishment

   (g) Problems raised by suspicious deaths in detention

   (h) Judicial police inquiries in criminal cases

   (i) Impunity of authors of disappearances

9. Provisional agenda for the next session

10. Adoption of the report of the Working Group to the Sub-Commission.

Annex I

DRAFT DECLARATION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED OR INVOLUNTARY DISAPPEARANCE

Preamble

The General Assembly,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations and other international instruments, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Considering that these rights derive from the inherent dignity of the human person,

Bearing in mind the obligation of States under the Charter, in particular, Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Deeply concerned that in many countries, persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support or acquiescence, direct or indirect, of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, thereby placing such persons outside the protection of the law,

Considering that enforced or involuntary disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms,

Recalling resolution 33/173 of 20 December 1978, by which the General Assembly expressed concern about the reports from various parts of the world relating to enforced or involuntary disappearances, as well as about the anguish and sorrow caused by these disappearances, and called upon Governments to hold law enforcement and security forces legally responsible for excesses which might lead to enforced or involuntary disappearances,

Recalling also the protection afforded to victims of armed conflict by the Geneva Conventions of 12 August 1949 and the Additional Protocols of 1977,

Having regard to Articles 3, 5, 6 and 9 of the Universal Declaration of Human Rights and Articles 6, 7, 9 and 16 of the International Covenant on Civil and Political Rights, which protect the right to life, the right to liberty and security of the person, the right not to be subjected to torture and the right to recognition as a person before the law,

Having regard further to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that States Parties shall take effective measures to prevent and punish acts of torture,

Bearing in mind the Code of Conduct for Law Enforcement Officials, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Standard Minimum Rules for the Treatment of Prisoners,

Affirming that, in order to prevent enforced or involuntary disappearances, it is necessary to ensure strict compliance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, contained in its resolution 43/173 of 9 December 1988, and with the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, contained in Economic and Social Council resolution 1989/65 of 24 May 1989 and endorsed by General Assembly resolution 44/162 of 15 December 1989,

Bearing in mind that, while the acts which comprise enforced or involuntary disappearance constitute a violation of the prohibitions found in the aforementioned international instruments, it is none the less important to devise an instrument which characterizes the enforced or involuntary disappearance of persons as a specific crime in and of itself, setting forth standards designed to punish and prevent its commission,

Proclaims the present Declaration on the Protection of All Persons from Enforced or Involuntary Disappearance, as a body of principles for all States, for any other public authorities, as well as for organized groups or private individuals acting on behalf of, or with the support or acquiescence, direct or indirect, of States or public authorities,

Urges that all efforts be made so that this Declaration becomes generally known and respected.

Article 1

1. Enforced or involuntary disappearance practised, permitted or tolerated by a Government is an offence to human dignity and shall be condemned as a flagrant and grave violation of the purposes of the Charter of the United Nations and of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.

2. Such enforced or involuntary disappearance inflicts severe suffering on the persons subjected thereto, as well as on their families, and places them outside the protection of the law. It violates the rules of international law guaranteeing, inter alia, the right to recognition everywhere as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture. It also violates or constitutes a grave threat to the right to life.

3. The systematized practice of such enforced or involuntary disappearance is a crime against humanity.

Article 2

1. No State shall practice, permit or tolerate enforced or involuntary disappearances.

2. States shall act jointly and in co-operation with the United Nations to contribute by all means to prevent and eradicate enforced or involuntary disappearance.

Article 3

Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate enforced or involuntary disappearances in any territory under its jurisdiction.

Article 4

Each State shall ensure that all forms of participation in enforced or involuntary disappearance by, or with the acquiescence of, a public official or anyone acting in an official capacity are specific crimes of the gravest kind under its criminal law, including complicity in, incitement to or an attempt to cause enforced or involuntary disappearance.

Article 5

Enforced or involuntary disappearances engage the personal responsibility of their perpetrators as well as the responsibility of the State whose authorities carried out, acquiesced in, or tolerated them.

Article 6

1. No order or instruction of any public authority, civilian, military or other, shall ever justify or be invoked to excuse enforced or involuntary disappearance.

2. Each State shall ensure that orders or instructions directing, ordering, authorizing or encouraging any enforced or involuntary disappearance are explicitly prohibited. Any person receiving such an order or instruction shall have the right and duty not to obey it.

3. Training of law enforcement officials shall emphasize the above provisions.

Article 7

At no time nor in any place whatsoever shall any exceptional circumstances, such as a state or threat of war or other armed conflict or any other public emergency, justify or be invoked to excuse enforced or involuntary disappearance.

Article 8

No State shall expel, return ("refouler") or extradite a person to any State where there are grounds to believe that the person would be in danger of enforced or involuntary disappearance.

Article 9

1. Each State shall ensure under all circumstances, including those referred to in Article 7, the right to an effective judicial remedy, including habeas corpus, as a means of determining the whereabouts or the state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty.

2. In such proceedings, competent authorities, national or international, shall have access to all places holding persons deprived of their liberty and to each part thereof, as well as to any place in which there are grounds to believe that such persons may be found.

Article 10

1. Each State shall ensure that persons deprived of their liberty are held in officially recognized places of detention and are brought before a judicial authority promptly after detention. Accurate information on their detention and whereabouts, including transfers, shall be made promptly available to their family members and counsel, anyone designated by them or other persons having a legitimate interest in the information.

2. Each State shall ensure the establishment of an official updated register at each place of detention existing in any territory under its jurisdiction, of all persons deprived of their liberty. Additionally, each State shall, to the extent possible, take steps to establish similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in paragraph 1 above and to any judicial or other competent and independent authority seeking to trace the whereabouts of a detained person.

Article 11

Each State shall ensure that persons deprived of their liberty are released in a manner permitting reliable verification that the persons have actually been released and, further, that they have been released into conditions in which their physical integrity is assured and which enable them to exercise fully the rights to which they are entitled.

Article 12

Each State shall establish rules under its domestic law indicating those officials authorized to order detentions, the conditions under which detention may be ordered, as well as sanctions for those officials who wilfully refuse to provide information on a person's detention. Each State shall likewise ensure strict control, including a clear chain-of-command, over all law enforcement officials and other persons authorized by law to use force and firearms.

Article 13

1. Each State shall ensure that anyone having knowledge or a legitimate interest who alleges that a person has been subjected to enforced or involuntary disappearance in any territory under its jurisdiction has the right to complain to a competent and independent authority, and to have the complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced or involuntary disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measures shall be taken to curtail or impede the investigation.

2. Each State shall ensure that the authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits.

3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.

4. The findings of such an investigation shall be made available upon request, unless doing so would jeopardize a disappeared person, any other innocent person or an ongoing criminal investigation or trial of an individual who is suspected of responsibility for an enforced or involuntary disappearance.

5. The obligations laid down in this Article are not subject to any limitation of time.

Article 14

Each State shall ensure that, when an individual alleged to have committed an offence referred to in Article 4 is found in any territory under its jurisdiction, that individual shall either be brought before its competent authorities for the purpose of investigation and, where the facts disclosed thereby so warrant, prosecution and trial, or be extradited to any State requesting extradition for the purpose of bringing the individual to justice. This provision shall apply regardless of the individual's nationality or the place where the offence was committed.

Article 15

Enforced or involuntary disappearance shall not be considered a political crime for the purpose of extradition. Participation in enforced or involuntary disappearance shall be treated as being included among extraditable offences in extradition treaties entered into by States.

Article 16

1. No State shall grant asylum or refugee status to individuals who have participated in acts of enforced or involuntary disappearance, regardless of the motives of such participation. However, asylum may be granted to such individuals for the sole purpose of allowing them to be instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to resolve cases of disappearance.

2. Mitigating circumstances may be established in national legislation for individuals who, having participated in enforced or involuntary disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to resolve cases of disappearance.

Article 17

1. Individuals alleged to have committed any of the acts referred to in Article 4 shall be suspended from any official duties during the investigation referred to in Article 13.

2. Such individuals shall be guaranteed fair treatment at all stages of the investigation and eventual prosecution and trial.

3. Penal liability shall be effective independently of any immunities enjoyed by the individuals responsible.

Article 18

The prosecution and punishment of offences of enforced or involuntary disappearance referred to in Article 4 shall not be subject to a statute of limitations.

Article 19

Individuals who have, are alleged to have, or may have committed offences referred to in Article 4 shall not benefit from any amnesty, pardon or other measure that might have the effect of exempting such individuals from criminal responsibility.

Article 20

Each State shall ensure in its legal system that the person subject to an enforced or involuntary disappearance and the person's family obtain redress and have an enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible. In the event of the death of a person as a result of an enforced or involuntary disappearance, the person's family shall be entitled to further compensation.

Article 21

1. States shall prevent and suppress the appropriation of children of parents subjected to enforced or involuntary disappearance and of children born during the mother's deprivation of liberty, and shall devote their efforts to the search, identification and, following a judicial decision, the restitution of the children to their families of origin.

2. States shall provide in their national legislation for the judicial review of the adoption of children referred to in paragraph 1. This judicial review may determine the restitution of the children to their family of origin. States shall also punish the crimes of abduction of children and the alteration and suppression of their true identity.

3. For these purposes, States shall conclude, where appropriate, bilateral or multilateral agreements.

Article 22

Nothing in the present Declaration shall be construed as restricting or derogating from any human right defined in the Universal Declaration of Human Rights or in any other international instrument or as limiting the obligation of States to ensure respect for such rights."

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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

(b) Question of human rights and states of emergency

Working paper presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37

CONTENTS

Chapter		Paragraphs	Page
	Introduction	1 - 9	2
I.	CRITERIA CONCERNING THE LEGALITY OF THE STATE OF EMERGENCY: THE PRINCIPLE OF NON-DISCRIMINATION ...	10 - 18	4
	A. Criteria concerning legality in international law	10 - 17	4
	B. Criteria concerning legality in internal law	18	5

Annex

I. List of replies received

INTRODUCTION

1. At its forty-first session, the Sub-Commission, in resolution 1989/28, expressed its appreciation to all Governments, competent organs of the United Nations, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council which had submitted their information and comments to the Special Rapporteur.

2. It invited Governments, competent organs of the United Nations, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status to provide further information to the Special Rapporteur.

3. It also invited Governments to limit the introduction of states of emergency exclusively to situations which were sufficiently serious and exceptional to justify them, particularly in the case of internal unrest, in order to avoid making the use of states of emergency commonplace and thus possibly perpetuating them.

4. The Sub-Commission recognized the fundamental importance of the existence, in each country, of specific and effective national legislation enabling such situations to be dealt with in a manner conforming to international norms. It invited Governments which had not yet done so to consider the adoption of internal legislation consistent with the requirements of international instruments concerning states of emergency and requested the Special Rapporteur to continue his work with the aim of submitting to the Sub-Commission draft standard provisions on emergency situations, including situations of internal unrest.

5. It requested the Secretary-General, under the programme of advisory services in the field of human rights, to give consideration to the technical assistance which might be furnished by the Special Rapporteur or by the Secretariat to States requesting it.

6. It invited the Special Rapporteur to continue the work with which he had been entrusted, to update his third report, so that the Commission on Human Rights, at its forty-sixth session, in 1990, would have before it the most recent and accurate information available, and to present to the Sub-Commission, at its forty-second session, a fourth annual report and list of States which, since 1 January 1985, had proclaimed, extended or terminated a state of emergency, updated on the basis of the information received. To that end, it requested the Secretary-General to give the Special Rapporteur all the assistance he might require in order to enable him to carry out his work successfully.

7. Finally, it decided to examine the updated report and list transmitted by the Special Rapporteur as a matter of priority at its forty-second session under the agenda item "Administration of justice and human rights of detainees: Question of human rights and states of emergency".

8. Since in 1989 the third annual report and annexed list (E/CN.4/Sub.2/1988/30 and Add.1 and Add.2/Rev.1) were submitted for translation and reproduction late (16 August) and hence could not be made available in all the working languages in time for the forty-first session

of the Sub-Commission, and also considering the fact that his revised and updated version intended for the Commission on Human Rights at its forty-sixth session, in 1990, contained information which has not yet been brought to the Sub-Commission's attention, the Special Rapporteur wished to have this latest version (E/CN.4/Sub.2/1988/30/Rev.1) of his third report distributed for consideration at the present session of the Sub-Commission.

9. In his third revised report (E/CN.4/Sub.2/1988/30/Rev.1, para. 27), the Special Rapporteur stated that he did not have the assistance he needed to fulfil his obligations. Although he was not able to present a fourth annual report to the Sub-Commission, he nevertheless wished to submit, in this working document, a few observations and recommendations which he suggests that the Sub-Commission and the Commission on Human Rights should adopt, concerning the criteria of legality applicable in international law and internal law to guarantee respect for human rights in states of emergency. These observations and recommendations are based on a study carried out by the Special Rapporteur on the development of international law and of the internal law of several countries with regard to the principle of non-discrimination. The Special Rapporteur also intends to present to the Sub-Commission at its present session, in an addendum to this document, an analysis of the new Constitution of Namibia and an updated version of the summary table on South Africa.

I. CRITERIA CONCERNING THE LEGALITY OF THE STATE OF EMERGENCY: THE PRINCIPLE OF NON-DISCRIMINATION

A. Criteria concerning legality in international law

10. At a time when the United Nations is implementing the second part of the programme of action for the Second Decade to Combat Racism and Racial Discrimination (see resolution 38/14 adopted by the General Assembly on 22 November 1983), the Special Rapporteur would like to stress the importance of the principle of non-discrimination, which Mrs. Nicole Questiaux (E/CN.4/Sub.2/1982/15, paras. 64-66) and the Special Rapporteur himself (E/CN.4/Sub.2/1985/19, para. 22) have emphasized in connection with the question of human rights and states of emergency.

11. As far back as 1949, article 3 common to the four Geneva Conventions, applicable to periods of armed conflict, provided that the persons protected by the Conventions should "in all circumstances, be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria".

12. Although such a safeguard clause was not included in the European Convention on Human Rights (art. 15), when it was adopted in 1950, it apparently should be understood as being implicit, since article 14 of the Convention, which prohibits any discriminatory measures, applies generally to the exercise of all the rights and guarantees recognized by the Convention, including those from which no derogation is permitted, which are listed in article 15.

13. In 1966, the International Covenant on Civil and Political Rights explicitly made the principle of non-discrimination (in art. 4, para. 1) one of the conditions for exercising the right it grants States parties to derogate from certain of its provisions under exceptional circumstances.

14. This trend was confirmed in 1969 by the text of article 27 of the American Convention on Human Rights.

15. The first Protocol additional to the Geneva Conventions of 1949 further strengthened this trend by using terms comparable to article 3 common to the four Geneva Conventions, with some additions: "without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria".

16. In 1982, Mrs. Questiaux had emphasized the fact that the International Covenant (art. 4, para. 1) and the American Convention (art. 24, para. 1) used similar terms to indicate that the measures taken under the right of derogation should not involve discrimination based solely 1/ on race, colour, sex, language, religion or social origin.

17. The fact that the prohibition of any form of discrimination is not included among the rights from which no derogation is permitted, as enumerated in article 4, paragraph 2, of the Covenant and article 27, paragraph 2, of the American Convention, should not stand in the way of implicit recognition of the fact that the principle of non-discrimination is one from which no derogation is permitted. The position given to the statement of this

principle in the text (in para. 1 of the article in question) and the strength of the terms used indicate the intention of the drafters of these two international instruments to treat the principle of non-discrimination as an essential condition for the exercise of the right of derogation they grant to the States parties. 2/

B. Criteria concerning legality in internal law

18. The Special Rapporteur suggests that all States should incorporate in their constitutional or legislative order provisions guaranteeing the principle of non-discrimination and making it a right from which no derogation is permitted, even in time of emergency.

Notes

1/ The word "solely" should be interpreted as permitting the taking of measures strictly required by the state of emergency against a part of the population (e.g. the quelling of a riot; see study by Nicole Questiaux, para. 65). See also Annotations on the text of the draft International Conventions on Human Rights prepared by the Secretary-General (A/2929), para. 44: "The third condition concerning non-discrimination also met with general approval, although there was some debate on the inclusion of the word 'solely'. For the retention of that word, it was argued that a State might take measures derogating from the rights recognized in the Covenant that could be construed as discriminatory merely because the persons concerned belonged to a certain race, religion, etc., but that the actual reason for the derogation might be otherwise. It was therefore important to emphasize that the evil to be avoided was discrimination based solely on the grounds mentioned. Further, it was considered that reference to the various grounds for non-discrimination set forth in article 2, paragraph 2, of the Universal Declaration of Human Rights would not be appropriate, since legitimate restriction might, in some cases, be imposed on certain categories mentioned therein."

2/ In its general comment 5/13 contained in its annual report to the General Assembly in 1981, the Human Rights Committee places the principle of non-discrimination on the same footing and includes it in the same sentence as the rights from which no derogation is permitted, as follows: "The State party, however, may not derogate from certain specific rights and may not take discriminatory measures on a number of grounds." (Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), p. 110).

ANNEX I

LIST OF REPLIES RECEIVED

I. Governments which provided information to the Special Rapporteur or sent notifications to the Secretary-General of the United Nations, the Council of Europe or the Organization of American States

Bolivia	8 January	1990
South Africa	9 July	1990
Union of Myanmar	14 June	1990
	7 May	1990
Yugoslavia	30 April	1990

II. Competent bodies of the United Nations

III. Specialized agencies

International Labour Organisation (ILO)	8 March	1990
	22 June	1990

IV. Other intergovernmental organizations

V. Non-governmental organizations

A. In consultative status with the Economic and Social Council

Amnesty International	June	1990
International Association of Democratic Lawyers	26 April	1990
Commission of Churches on International Affairs		1990
International Defence and Aid Fund for Southern Africa	2 April	1990
Minority Rights Group	June	1990

B. Other organizations

Transnational Perspectives	6 August	1989
	26 January	1990

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(b) Question of human rights and states of emergency

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Addendum

CONTENTS

Chapter		Paragraphs	Page
I.	CRITERIA CONCERNING THE LEGALITY OF THE STATE OF EMERGENCY	1-20	2
	B. Criteria concerning legality in internal law (continued): analysis of the Constitution of Namibia		

I. CRITERIA CONCERNING THE LEGALITY OF THE STATE OF EMERGENCY

B. Criteria concerning legality in internal law (continued): analysis of the Constitution of Namibia

1. The Special Rapporteur has closely followed the developments that have taken place in Namibia since his first report (E/CN.4/Sub.2/1987/19/Rev.1 and Add.1 and 2). He received, inter alia, relevant information on this question from the United Nations Commissioner for Namibia (letter dated 30 November 1987 and document A/42/24 (Part I); report of the United Nations Council for Namibia; letter dated 17 August 1988 and documents A/AC.131/284 (Political developments related to Namibia) and A/AC.131/285 (Social conditions in Namibia). The Special Rapporteur has based the current analysis on the original English text of the new report by the Secretary-General on the implementation of Security Council resolution 435 (1978) concerning the question of Namibia (S/20967/Add.2), which contains the definitive text of the Constitution as adopted on 9 February 1990 by the Constituent Assembly of Namibia.

2. One of the main problems the Special Rapporteur has identified since the beginning of his work is that of the deterioration of respect for human rights during states of emergency. In general, when internal law contains no provisions to guarantee the maintenance of respect for human rights in such situations, the Special Rapporteur attaches a great deal of importance, on the one hand, to the adoption of new rules governing the state of emergency or the amendment of existing rules and, on the other, to the fact that such new or revised rules should be based on the principles and criteria concerning the legality of states of emergency defined by Mrs. Questiaux in her study contained in document E/CN.4/Sub.2/1982/15 (paras. 42-72) and by the Special Rapporteur himself in his explanatory paper (E/CN.4/Sub.2/1985/19, paras. 18-23).

3. With regard to the Constitution of Namibia, the Special Rapporteur is of the opinion that the content of its provisions is a good example of legal mastery of the problem. Although the Constitution is to be welcomed in several respects, the Special Rapporteur will refer only to that concerning the state of emergency, as considered in the light of international principles and criteria.

4. Chapter 4 of the Constitution is entitled "Public emergency, state of national defence and martial law". It consists of one article (26) entitled "State of emergency, state of national defence and martial law". Chapter 3 relates to fundamental human rights and freedoms and contains an article 24 entitled "Derogation".

Principles of legality and proclamation

5. According to article 26, paragraph (1), of the Constitution of Namibia, "the President may by Proclamation in the Gazette declare that a state of emergency exists in Namibia or any part thereof".

6. According to article 26, paragraph (7), the President has the power to proclaim or terminate martial law.

Principle of notification

7. At the time the present document was being prepared, Namibia had not ratified or acceded to the International Covenant on Civil and Political Rights and therefore had no obligation to notify the Secretary-General of the United Nations under article 4 of the Covenant. However, in accordance with the practice followed by a number of states in a similar situation, the Special Rapporteur would appreciate being notified if the President of the Republic of Namibia one day decided to proclaim a state of emergency.

Principle of exceptional threat

8. The state of emergency may be declared in three crisis situations, under two circumstances: at a time of national disaster or during a state of national defence or public emergency threatening the life of the nation or the constitutional order.

9. Martial law may be proclaimed only when a state of national defence involving another country exists or when civil war prevails.

Powers of the Executive and principle of proportionality

10. The principle of proportionality is based on the theory of self-defence: the measures taken to ensure protection against an imminent danger must be proportionate to the danger.

11. According to that principle, it has to be determined, derogation by derogation and both in time and in space, whether the measures of restriction or suspension enacted go beyond the strict limits required by the situation. To this end, it must be asked whether the measures admissible in normal times would not have been sufficient, whether the emergency measures really make it possible to abate or bring to an end the specific situation of danger and, when ordinary guarantees have been suspended, whether extra-judicial replacement guarantees have been introduced (see Questiaux, op.cit. supra, paras. 60-63).

12. Article 26, paragraph (5), of the Constitution provides that, during a state of emergency in terms of that article or when a state of national defence prevails, the President has the power by Proclamation to make such regulations as in his or her opinion are necessary for the protection of national security, public safety and the maintenance of law and order, including a regulation to suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by the Constitution for such period and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency.

13. Where any such regulation provides for detention without trial, an Advisory Board is appointed by the President on the recommendation of the Judicial Service Commission and consists of no more than five persons, of whom no fewer than three must be judges of the Supreme Court or the High Court or qualified to be such. The functions of the Advisory Board are set out in article 24, paragraph (2)(c).

Principle of temporariness

14. According to article 26, a declaration of a state of emergency, if not sooner revoked, ceases to have effect: (a) seven days after its publication if it was made when the National Assembly was sitting or had been summoned to meet; and (b) in any other case, at the expiration of a period of 30 days after its publication.

15. Before the expiration of those periods, however, the state of emergency may be extended by a resolution adopted by a two-thirds majority of all the members of the National Assembly. In such a case, the state of emergency is extended by the period specified in the resolution or for not more than six months.

16. The National Assembly may at any time adopt a resolution revoking the state of emergency.

17. Any regulation made by the President pursuant to article 26, paragraph (5), ceases to have legal force if it has not been approved by a resolution of the National Assembly within 14 days of the date when the National Assembly first sits in session after the entry into force of that regulation.

18. The President has the power to terminate martial law. However, martial law automatically ceases to be valid if it is not approved within a reasonable time by a resolution adopted by a two-thirds majority of the members of all the National Assembly.

Principles of intangibility and non-discrimination

19. Under paragraph (3) of article 24 dealing with derogations, nothing contained in that article can permit a derogation from or suspension of the fundamental rights or freedoms referred to in articles 5 (Protection of fundamental rights and freedoms), 6 (Protection of life), 8 (Respect for human dignity), 9 (Slavery and forced labour), 10 (Equality and freedom from discrimination), 12 (Fair trial), 14 (Family), 15 (Children's rights), 18 (Administrative justice), 19 (Culture) and 21 (1) (a), (b), (c) and (e) (Freedom of speech and expression, including freedom of the press and other media; freedom of thought, conscience and belief, including academic freedom in institutions of higher learning; freedom to practise any religion and to manifest such practice; and freedom of association, including freedom to form and join trade unions and political parties) or the denial of access by any persons to legal practitioners or a court of law.

20. Article 24 also provides that:

"Article 24 Derogation

(1) Nothing contained in or done under the authority of Article 26 hereof shall be held to be inconsistent with or in contravention of this Constitution to the extent that it authorises the taking of measures during any period when Namibia is in a state of national defence or any period when a declaration of emergency under this Constitution is in force.

(2) Where any persons are detained by virtue of such authorisation as is referred to in Sub-Article (1) hereof, the following provisions shall apply:

(a) they shall, as soon as reasonably practicable and in any case not more than five (5) days after the commencement of their detention, be furnished with a statement in writing in a language that they understand specifying in detail the grounds upon which they are detained and, at their request, this statement shall be read to them;

(b) not more than fourteen (14) days after the commencement of their detention, a notification shall be published in the Gazette stating that they have been detained and giving particulars of the provision of law under which their detention is authorised;

(c) not more than one (1) month after the commencement of their detention and thereafter during their detention at intervals of not more than three (3) months, their cases shall be reviewed by the Advisory Board referred to in Article 26(5)(c) hereof, which shall order their release from detention if it is satisfied that it is not reasonably necessary for the purposes of the emergency to continue the detention of such persons;

(d) they shall be afforded such opportunity for the making of representations as may be desirable or expedient in the circumstances, having regard to the public interest and the interests of the detained persons."

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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

(b) Question of human rights and states of emergency

Update on summary table South Africa as was presented in E/CN.4/Sub.2/1989/30/Rev.1 (page 12)

Addendum

CONTENTS

	Paragraphs	Page
SUMMARY TABLE SOUTH AFRICA		

South Africa

Proclamation, extension or termination	Date	Duration	Territory	Grounds	Measures taken	Rights concerned
Lifting of some Emergency Regulations	2.2.90		Entire territory	In view of President de Klerk's policy on "negotiated understanding"	Abolishing of Media and Education Emergency Regulations, lifting of Security Emergency Regulation 7, (R.86 of 1989) including order 1220 (prohibition of certain organizations) limit of period of detention, access to lawyers and doctors	art. 19 CCPR art. 13 CESCR art. 18 CCPR art. 21 CCPR art. 22 CCPR art. 14 CCPR
Proclamation of State of Emergency	8.6.90		Province of Natal including part of self-governing territory of KwaZulu within the boundaries of Natal	Because of "a factual state of emergency which seriously threatens the safety of the public and maintenance of public order and which cannot be countered with the ordinary laws of the land"	Introduction of Regulation 4 (appointment of special advisers) and of R.15 (proof of certain facts)	

REMARKS

Principle of proclamation

At the opening session of the South African Parliament, on 2 February 1990, President F.W. de Klerk announced the lifting of some emergency regulations in the light of the "growing realization that only a negotiated understanding among the representative leaders of the entire population is able to ensure lasting peace". This included the abolishment of the Media Emergency Regulations (R. 88 of 1989) as well as of the Education Emergency Regulations (R. 89 of 1989) in their entirety and the rescinding of the restrictions on 33 organizations (Regulation 7 (1-5) of R. 86 of 1989), as well as a revision of regulation 3: arrest and detention of persons, limiting the period of detention to six months and provision of the right of access to lawyers and medical practitioners by detainees.

During an address to a joint session of Parliament, on 7 June 1990, President de Klerk stated that "the state of emergency is due to elapse at midnight on 8 June and the time has once again arrived for the Government to give this question its consideration". "After thorough consideration of all the relevant factors, I have decided that there will no longer be a general country-wide state of emergency." "The Government has pursued with all its might and resources the ideal that as far as security was concerned, there should be a return to normality in which the remaining vestiges of violence could be countered with the ordinary laws of the land. That point has now been reached."

"As far as Natal is concerned, there is still a factual state of emergency, which seriously threatens the safety of the public and maintenance of public order and which cannot be countered with the ordinary laws of the land. The increasing phenomenon in Natal of violence among blacks, which has led to the destruction of human life, ... must still be countered by the strongest means available." "For that reason I have, in consultation with the Government's security advisers and the Cabinet, decided to announce the existence of a state of emergency in the province of Natal, including the self-governing territory of KwaZulu."

Excerpts of the above address were issued by the Permanent Mission of South Africa to the United Nations in New York in a press release of 7 June 1990.

On 11 July 1990 the Special Rapporteur received from the Government of South Africa copies of Proclamations R. 97 and R. 98 of 8 June 1990 containing Security Emergency Regulations and Prison Emergency Regulations respectively.

Measures taken and rights concerned

R. 97 and R. 98

In deviation from earlier security regulations, the Security Emergency Regulations of 1990 are now drafted for a designated area. The major changes of 3 February 1990, such as limit of detention up to six months (Regulation 3 (3)) as well as access to a medical practitioner and a legal representative (Regulation 3 (8)) are maintained. New is Regulation No. 4 on

the appointment of special advisers to the Minister, who can visit detainees and check whether the circumstances of the detention are in accordance with the applicable statutory, and who can compile reports in case of offences in respect of the physical or psychological integrity of the detainee. Regulation No. 15 introduces the concept of "Proof of certain facts", where, in case of proceedings before a court of law on the issue of prolongation of detention, restrictions on activities or prohibition of particular activities, the production of an affidavit by anybody who has been acting on behalf of the Minister of Law and Order, shall be accepted as conclusive proof of the facts stated therein.

The prison emergency regulations have remained unchanged.

Impact on human rights

Information received from NGOs will be analysed and transmitted to the Government of South Africa for comments, if necessary.

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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

The right to a fair trial

Brief report prepared by Mr. Stanislav Chernichenko and Mr. William Treat in accordance with resolution 1989/27 of the Sub-Commission

CONTENTS

Chapter		Paragraphs	Page
	Introduction	1 - 3	1
I.	PRINCIPAL SOURCES OF INTERNATIONAL FAIR TRIAL NORMS	4 - 28	2
	A. Treaty provisions on the right to a fair trial	5 - 8	2
	B. Other instruments with provisions on fair trial	9 - 12	2
	C. Other provisions relevant to the right to a fair trial	13 - 24	3
	D. Interpretations relating to the right to a fair trial	25 - 28	4

CONTENTS (continued)

Chapter		Paragraphs	Page
II.	GENERAL OBSERVATIONS	29 - 41	6
III.	ANALYSIS OF GENERAL FAIR TRIAL STANDARDS	42 - 57	9
	A. Methods of conducting a trial	46 - 55	9
	B. Approaches to the submission and evaluation of evidence	56 - 57	12
IV.	ANALYSIS OF THE ELEMENTS OF A FAIR CRIMINAL TRIAL	58 - 133	13
	A. Arrest and interrogation	60 - 61	13
	B. Treatment during detention	62 - 66	13
	C. Notice	67 - 71	14
	D. Counsel	72 - 77	15
	E. Hearing	78 - 100	16
	F. Decision	101 - 112	19
	G. Sentencing and punishment	113 - 122	20
	H. Appeal	123	21
	I. Pardon	124 - 125	21
	J. Other remedies	126 - 129	22
	K. Procedures for juvenile offenders	130 - 131	22
	L. Other processes	132	23
V.	THE RIGHT TO FAIR TRIAL AS A NON-DEROGABLE RIGHT	133 - 145	24
VI.	RECOMMENDATIONS	146 - 153	28
Annex I.	SELECTED BIBLIOGRAPHY		29

Introduction

1. Resolution 1989/27 of the Sub-Commission requested two of its members to prepare a brief report on existing international standards pertaining to the right to a fair trial. The Sub-Commission also requested that the two members recommend "which provisions guaranteeing the right to a fair trial should be made non-derogable".

2. On 7 March 1990, the Commission on Human Rights by its decision 1990/108 "welcomed the Sub-Commission's decision to appoint Mr. Stanislav Chernichenko and Mr. William Treat to prepare a report on the right to a fair trial and requested the Sub-Commission to consider that report directly under the agenda item 10 (d) entitled 'Administration of Justice and the human rights of detainees: the right to a fair trial' at its forty-second session."

3. This brief report provides an overview of the subject and indicates the areas where further study is needed. Part II of this brief report identifies the sources of international fair trial norms. Part III makes several general observations. Part IV makes an analysis of general fair trial standards. Part V identifies the attributes of a fair trial and selects those international human rights standards which are the most protective of each attribute of a fair trial. Part VI presents existing norms and issues which are relevant to a consideration of the right to a fair trial as a non-derogable right. Part VII suggests the further work which needs to be accomplished in order to prepare a more comprehensive report on the right to a fair trial and how it might be strengthened.

I. PRINCIPAL SOURCES OF INTERNATIONAL FAIR TRIAL NORMS

4. This part refers to the principal treaties and other instruments containing provisions on the right to a fair trial. The part then cites other provisions and interpretations relevant to the right to a fair trial. Later parts of the report discuss the sources identified here.

A. Treaty provisions on the right to a fair trial

5. Article 14 of the International Covenant on Civil and Political Rights recognizes the right to "a fair trial and public hearing by a competent, independent and impartial tribunal established by law." Every person is "equal before the courts and tribunals" under article 14 (1). Article 14 also distinguishes between the sort of fair hearing required for civil and criminal cases; most of article 14 deals with the "minimum guarantees" required in the determination of any criminal charge, which will be elaborated in Part V of this report.

6. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment provides in article 15 "that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings." Also, article 7 guarantees fair treatment at all stages of the proceedings brought against a person charged with having engaged in or attempted torture.

7. The African Charter on Human and Peoples' Rights (art. 7), the American Convention on Human Rights (art. 8), and the European Convention on Human Rights (art. 6) all contain fair trial provisions.

8. Common Article 3 of the four Geneva Conventions for the Protection of Victims of War of 1949 and article 6 of Additional Protocol II of 1977 contain fair trial guarantees for times of non-international armed conflict. Articles 96 and 99-108 of the Third Geneva Convention prescribe the rights of prisoners of war in judicial proceedings essentially creating a fair trial standard. Articles 54, 64-74, and 117-126 of the Fourth Geneva Convention contain provisions relating to the right to fair trial in occupied territories. Additional Protocol I (art. 75) extends fair trial guarantees in an international armed conflict to all persons including those arrested for actions relating to the conflict.

B. Other instruments with provisions on fair trial

9. Article 10 of the Universal Declaration of Human Rights provides, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 11 (1) protects the "right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

10. The Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 of 29 November and 40/146 of 13 December 1985, help assure the right to a fair trial by preserving the independence and impartiality of the judiciary.

11. The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the Economic and Social Council on 24 May 1989, require the "thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions." To that end there are several Principles relevant to the right to a fair trial including Principle 10 which indicates that the investigative authority shall have the power to oblige witnesses to appear and testify.

12. The Concluding Document of the Vienna Follow-up Meeting of the Conference on Security and Co-operation in Europe, issued 17 January 1989, indicates that the participants will "ensure effective remedies" and defines those remedies. The parties to the Vienna Concluding Document have also undertaken to observe the United Nations Standard Minimum Rules for the Treatment of Prisoners, to observe the United Nations Code of Conduct for Law Enforcement Officials, to prohibit torture and other ill-treatment, to protect individuals from psychiatric and other medical practices that violate human rights, and to limit the use of the death penalty.

C. Other provisions relevant to the right to a fair trial

13. Provisions prohibiting arbitrary arrest and detention may be found in the Universal Declaration (art. 9), the Civil and Political Covenant (art. 9), the African Charter (art. 6), the American Convention (art. 7), and the European Convention (art. 5).

14. Provisions against torture or other cruel, inhuman or degrading treatment or punishment are contained in article 5 of the Universal Declaration, article 7 of the Civil and Political Covenant, articles 2-4 of the Convention against Torture, articles 2-4 of the Declaration against Torture, Article 5 of the African Charter, article 5 of the American Convention, and article 3 of the European Convention. During international armed conflicts, torture is forbidden by Geneva Convention I, article 12; Geneva Convention II, article 12; Geneva Convention III, articles 17 and 87; Geneva Convention IV, article 32; and article 75 of Additional Protocol I. During non-international armed conflicts, torture is forbidden by Common Article 3 of the four Geneva Conventions and article 4 of Additional Protocol II.

15. The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly resolution 43/173 of 9 December 1988, establishes an obligation to inform detainees of their rights (Principle 13), to bring detainees before a judicial or other authority promptly after arrest (Principle 11), and to provide access to legal counsel (Principle 17).

16. The Standard Minimum Rules for the Treatment of Prisoners contain several provisions which are relevant to the right to a fair trial, including the right to receive visits from a legal adviser (art. 93) within sight but not within the hearing of prison officials.

17. The Code of Conduct for Law Enforcement Officials, General Assembly resolution 34/169 of 17 December 1979, requires in article 2 that law enforcement officials respect and protect the human rights of all persons, which would apparently include the right to a fair trial.

18. Provisions recognizing the right to life and limiting the death penalty are found in the Universal Declaration (arts. 3, 5), the Civil and Political Covenant (arts. 6, 7), the Second Optional Protocol to the Civil and Political Covenant, the African Charter (arts. 4, 5), the American Convention (arts. 4, 5), European Convention (arts. 2, 3), and Protocol 6 to the European Convention.

19. The ESOSOC safeguards guaranteeing protection of the rights of those facing the death penalty, ECOSOC resolution 1984/50 of 25 May 1984, state: "Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right ... to adequate legal assistance at all stages of the proceedings."

20. Provisions which prohibit use of ex post facto laws and retroactive punishment exist in the Universal Declaration (art. 11), the Civil and Political Covenant (art. 15), the African Charter (art. 7), the American Convention (art. 9), and the European Convention (art. 7).

21. Provisions prohibit imprisonment solely for breach of contract in the Civil and Political Covenant (art. 11), the American Convention (art. 7), and Protocol No. 4 to the European Convention.

22. The right to an effective remedy either by the national tribunals or another national authority for violation of an individual's fundamental rights is guaranteed by the Universal Declaration (art. 8), the Civil and Political Covenant (art. 2), the American Convention (arts. 10, 25), and the European Convention (art. 13).

23. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") contain provisions (art. 14.1) for a "fair and just trial" relating to juvenile offences.

24. Article 16 of the Convention and Protocol relating to the Status of Refugees provides refugees with free access to courts of law and the same treatment as a national in regards to legal assistance in the refugee's country of habitual residence.

D. Interpretations relating to the right to a fair trial

25. The Human Rights Committee has issued General Comments on several of the provisions in the Covenant on Civil and Political Rights. The General Comment on article 14 of the Covenant is particularly helpful in interpreting the right to a fair trial.

26. The Human Rights Committee has decided several cases under the Optional Protocol to the Civil and Political Covenant as to the meaning of the right to a fair trial and the requirement of a prompt trial.

27. The Inter-American Commission on Human Rights has issued several fact-finding reports and adopted a number of resolutions on cases relating to the right to a fair trial under the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.

28. The European Commission and Court of Human Rights have rendered decisions interpreting the right to a fair trial under the European Convention.

II. GENERAL OBSERVATIONS

29. The concept of "a fair trial" concerns both criminal and civil proceedings. Each type of proceeding has its own character. Nevertheless, certain principles can be applied in any court - whether it be an emergency court, a military tribunal, a juvenile court, etc. If those principles are not observed in accordance with a modern concept of justice the trial cannot be fair. Moreover, some of the principles of fairness also apply to cases in international courts and arbitration tribunals. Principles of a fair trial may be found in treaties and other international instruments; some of them can be considered as general principles of law as mentioned in paragraph 1 (c) of Article 38 of the Statute of the International Court of Justice.

30. It is evident that general principles of law include principles of a procedural nature. Since the question of the right to a fair trial is examined in the context of human rights, particular attention should be given to procedural principles found in the domestic practices of governments. Such principles may also be applied by international courts dealing with cases related to human rights, for example, the Nüremburg and Tokyo Tribunals, the European Court of Human Rights, and the Inter-American Court of Human Rights.

31. Justice principally requires that a trial must be objective. Objectivity may have philosophical, moral and juridical aspects. Objectivity cannot solely be achieved by juridical measures. Certain economic, political, and other conditions may be required in order for juridical protections to achieve an objective trial. Particular societies may have different ideas of objectivity and fairness. Differences in economic, social and cultural levels of development together with historical, religious and other factors may influence a society's understanding of objectivity and fairness. Nevertheless, sufficiently clear views of fairness and objectivity have emerged such that juridical criteria for an objective trial can be established. Such juridical criteria cannot provide a complete assurance, but they do contribute to the achievement of fair and objective trials.

32. It is widely believed that the objectivity of a trial is the same as a fair trial. There is, of course, a direct link, but there are different shades of meaning within the two concepts. Fairness relates to a sense that justice has been done and been seen to be done. Objectivity basically considers whether the facts have been adduced, the facts have been assessed according to the relevant law, and appropriate procedures have been followed. It is difficult to draw a precise line between objectivity and fairness. In any case, it is necessary to define with precision what juridical measures will help to ensure the objectivity and hence the fairness of a trial.

33. Possible juridical measures to ensure fairness may be very broadly categorized as (a) those measures relating to the organization of adjudicative bodies and (b) procedural guarantees for the conduct of the trial. Organizational matters are concerned with the procedures for appointing judges, and other competent decision-makers, etc. Procedural guarantees may also help to ensure objectivity of court proceedings.

34. Essentially, all aspects of the organization of the judiciary should help create conditions for conducting judicial proceedings that exclude any outside influence on the court's evaluation of the facts and application of the law. Organizational measures for achieving fairness ultimately ensure the

independence of judges as individuals and the independence of the judiciary as a whole. Without these organizational measures, procedural guarantees of fairness will not be effective.

35. Means of guaranteeing the independence of the judiciary are closely linked to means for assuring the independence of lawyers and other representatives. Different approaches to independence may be appropriate for civil and criminal cases; but unless lawyers and other representatives are guaranteed independence, a fair trial cannot be ensured, even if the judges are independent. The independence of judges, lawyers, assessors and other participants in the judicial process has already been studied by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. (See L.M. Singhvi, "The administration of justice and the human rights of detainees: study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers", United Nations document E/CN.4/Sub.2/1985/18 and Add.1-6, 1985). Nevertheless, it is appropriate to recall the importance of this issue - particularly in the preliminary investigation of criminal cases - as an important requirement of a fair trial.

36. Procedural guarantees of the objectivity of courts can be characterized as conditions, methods, measures, etc. The commonly used term "guarantee" may give the misleading impression that a particular procedural right will assure objectivity. In fact, some procedures can help to ensure fairness; others may be less effective. Nevertheless, each procedural right should not be assessed separately, because all procedural rights must be combined to achieve fairness and objectivity. Procedural guarantees may be broadly divided into methods of conducting a trial and approaches to the submission and examination of evidence.

37. The relationship between the objectivity and impartiality of a trial deserves attention. These two concepts are closely related, but they may be distinguished in certain respects. Impartiality relates to the course of the trial and indicates that the judge or trier of fact will not favour one party or other during the trial and the parties will have equal opportunity to present their positions. Impartiality also describes the appropriate attitude of the court to the case being tried and that there will be an unbiased assessment of the evidence. Objectivity relates to the correctness of a trial's procedures, the way evidence is evaluated so as to select the most effective juridical approach to discover the truth.

38. The concepts of independence, impartiality, objectivity and fairness of a trial are interrelated: independence is a prerequisite and essential condition for the impartiality of a trial, although it is not a complete guarantee of impartiality. Impartiality is the best, albeit incomplete, guarantee of objectivity. In almost all cases, the objectivity of a trial indicates its fairness. Fairness may not be achieved, however, in a few situations, for example, if the court applies outdated or otherwise inappropriate legislation.

39. The present report will not extensively explore the issues of impartiality and independence of the judiciary, becaue those concepts were studied by L.M. Singhvi. (See Singhvi, "The administration of justice and the human rights of detainees: study on the independence and impartiality of the

judiciary, jurors and assessors and the independence of lawyers," (E/CN.4/Sub.2/1985/18 and Add.1-6, 1985). The Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly on 19 November and 12 December 1985 provide some guidance as to the issue, but those principles are stated in rather general terms and have not been incorporated in a treaty. The Basic Principles will probably be clarified and supplemented in the future.

40. Another important prerequisite of a fair trial is the competence of the judges, who should possess a high level of professional training and experience. Judges should also possess high moral integrity, which is difficult to measure precisely, but is as important as other requirements of a fair trial.

41. Impartiality and objectivity are two criteria for a fair trial and these criteria must be fulfilled by specific procedural guarantees. Countries have adopted various procedures for assuring a fair trial, including a public hearing, proceedings in which all parties are permitted to participate, the right of the parties and of witnesses to use their own language (including the provision of translation), prohibition of any kind of influence on the court to undermine its independence (for example, attempts to exert pressure, infringement of the secrecy of deliberations, etc.), and the right to counsel or other representative. These procedures provide the minimum guarantees for an objective trial in both civil and criminal proceedings, although the procedures may be applied in different ways as required by the type of proceeding. These procedural guarantees are found in the principal international standards for the administration of justice. None the less, the incorporation of guarantees in international standards cannot assure that the procedures will be implemented successfully at the national level. Therefore, it would appear desirable to draft more detailed standards and to consider means of monitoring implementation.

III. ANALYSIS OF GENERAL FAIR TRIAL STANDARDS

42. Though most international fair trial standards relate to criminal proceedings, discussed in Part V below, there are some standards that apply to all proceedings. This part analyses (A) methods of conducting a trial and (B) approaches to the submission and examination of evidence. In considering the requirements of a fair trial, both in civil and criminal cases, the court should apply those standards which are the most protective of the rights of the individual. Principal among the basic fair trial standards are article 8 of the Universal Declaration of Human Rights, article 2 (3) (b) of the International Covenant on Civil and Political Rights, a similar provision of the 1989 Vienna Concluding Document of the Conference on Security and Co-operation in Europe, article 10 of the Universal Declaration, and article 14 of the Covenant on Civil and Political Rights.

43. Article 8 of the Universal Declaration of Human Rights provides, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

44. Article 2 (3) (b) of the Covenant on Civil and Political Rights states that each State Party undertakes "to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy".

45. The 1989 Concluding Document of the Vienna Follow-up Meeting of the Conference on Security and Co-operation in Europe indicates that the participants will "ensure effective remedies ... to those who claim that their human rights ... have been violated". Those remedies include "the right of the individual to appeal to executive, legislative, judicial or administrative organs; the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice; [and] the right to be promptly and officially informed of the decision to be taken on any appeal including the legal grounds on which this decision is based". Some countries require a fair hearing before the loss of any interest or right, except in those cases in which the imminent danger or extreme harm to the public outweighs the right to a hearing beforehand.

A. Methods of conducting a trial

46. Article 10 of the Universal Declaration of Human Rights states, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

47. This provision is substantially amplified by article 14 (1) of the Covenant on Civil and Political Rights:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal

established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

48. The Human Rights Committee in its general comment on Article 14 emphasizes the importance of a public trial and the "exceptional circumstances" which must exist to exclude the public. The Committee maintains that a public hearing cannot exclude members of the press or limit the attendance to only a particular category of persons. (Official Records of the General Assembly, Thirty-ninth session, Supplement No. 40, paragraph 144, (A/39/40), 1984). The various "exceptional circumstances" should be restrictively construed so as to preserve the right to a public trial. The "exceptional circumstances", such as "reasons of morals" and "special circumstances where publicity would prejudice the interest of justice" could be studied and carefully defined, so as to assure the right to a public trial.

49. The right of all parties to participate fully in the proceedings provides a significant safeguard for a fair trial. Indeed, this right constitutes a general principle of law. This principle, as applied to criminal cases, is reflected in article 14 (3) (d) of the Covenant on Civil and Political Rights, which stipulates the right of everyone charged with a criminal offence to be tried in his/her presence and to defend him/herself in person, or through legal assistance of his/her own choosing. The right to participate includes the equal right of each party to present evidence, to present their evaluation of the evidence, to defend their position on the basis of full equality before the law, to be present in person, and to use a freely chosen representative to defend his/her interests. The application of these rights take into account the nature of the proceedings, for example, civil suits and criminal cases. In some countries fairness is guaranteed by the adversary nature of the proceedings or the "equality of arms" between the parties. Consideration should be given to how these ideas might be defined and more broadly applied.

50. One of the procedural safeguards which may be regarded as universal and thus part of an international standard is the right of each of the parties concerned to present evidence on their behalf and to give their opinion on all the evidence before the court. This safeguard includes the right to question witnesses and thus gives the court an opportunity to review the evidence from various perspectives. The existence of this standard is confirmed to some extent by article 14 (3) (e) of the Covenant on Civil and Political Rights, which provides for the right of everyone charged with a criminal offence "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Logic and the prevalence of this principle in national legal systems suggest that this standard should apply to civil cases, as well.

51. In certain circumstances it is possible that a case may be heard in the absence of one or more of the parties concerned and a decision or judgement may even be announed in absentia. For example, repeated failure of a party in a civil suit to appear in court without valid reason may result in the case being considered in his/her absence. In a criminal case, the accused may be removed if his/her misconduct hinders the proceedings. There have even been a few cases in which international courts have conducted trials in absentia, for example, the trial of Martin Bormann before the Nuremburg Tribunal. Indeed, though criminal trials ordinarily are terminated upon the death of the accused, there may be rare circumstances in which it may be necessary to undertake a proceeding against a person who has died. For example, in the Soviet Union, there has been extensive unofficial discussion about the case of J.V. Stalin. It would appear desirable to prepare a list of grounds as to which civil and criminal cases may be tried in the absence of the party concerned.

52. Article 14 (3) (f) of the Covenant on Civil and Political Rights refers only to the right of everyone charged with a criminal offence "to have the free assistance of any interpreter if he cannot understand or speak the language used in the court". Consideration should be given to the application of this provision mutatis mutandis to civil cases. Consideration should also be given, however, to whether free interpretation might be provided in civil proceedings, especially in proceedings in which serious consequences may be involved. Consideration should further be given to the provision of bilingual interpretation when witnesses in a criminal or civil case are not proficient in the language used in court. In addition, consideration should be given to what parts of the trial ought to be the subject of interpretation. In some countries, interpretation is only provided for certain formal aspects of the trial and the parties may thus be unable to understand the proceedings as a whole.

53. The independence of the judiciary and the fairness of all trials make unacceptable any interference or attempt to exert pressure by authorities or persons not involved in the case. This problem, as mentioned above, has been studied by the Sub-Commission's Special Rapporteur, L.M. Singhvi. He noted the significance for guaranteeing fair trial of the powers of the judiciary, the duties of judges, their selection and appointment, and their independence in decision-making (independence both from their colleagues and their superiors). Though not every aspect of Mr. Singhvi's study may be directly relevant to the right to a fair trial, some aspects of the independence of the judiciary may be regarded as essential requirements of fairness. For example, the Basic Principles on the Independence of the Judiciary state: "There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision ...." Mr. Singhvi's Draft Universal Declaration on the Independence of Justice elaborated on this principle:

> No power shall be so exercised as to interfer with the judicial process ...
>
> The Executive shall not have control over the judicial functions of the courts in the administration of justice.

54. The independence of the court should be manifested not only in its organization, but also in the actual proceedings. The independence of the

court and thus the fairness of the proceedings may be established by clearly defined procedures for the selection of judges, opportunities for either party to challenge a judge, guidelines on conflicts of interest in which the judge should recuse him/herself, and by a prohibition against making a judge subordinate to any other judge during the proceeding.

55. While it is not difficult to establish a clear prohibition against interference by authorities or individuals, it is a far more complex matter to define what constitutes unlawful interference by unofficial pressures, such as public opinion. The media, demonstrations, and other forms of freedom of expression can have an impact on a trial. Article 19 of the Covenant on Civil and Political Rights protects freedom of expression with certain restrictions relating to respect for the rights or reputations of others, protection of national security, public order (ordre public), and public health or morals. The relationship between freedom of expression (with its restrictions) and the right to a fair trial may need further clarification. This issue may also be considered in the Sub-Commission's present study on the right to freedom of opinion and expression, which has been undertaken by L. Joinet and D. Turk.

B. Approaches to the submission and examination of evidence

56. The Convention against Torture and Other Cruel, Inhuman, or Degrading Punishment forbids the use of evidence obtained by torture, except to bring a torturer to justice. Some countries have applied a broader principle that evidence obtained by improper means should not be taken into account by the court in criminal cases or even in civil proceedings. Obtaining evidence by improper means may be interpreted in different ways even in countries where this evidence exclusion rule is applied. For example, evidence may be obtained by improper means if objects are seized during a search conducted without a duly issued warrant, telephone conversations are recorded without a warrant, or information is procured by any other arbitrary or unlawful interference with privacy, family, home or correspondence. In some countries courts refuse to take into account certain forms of hearsay or indirect evidence. There is a diversity of approaches to the appreciation and consideration of evidence. Excluding evidence obtained by improper means may encourage the court to look more closely at all evidence and may help strike a balance between the right to a fair trial and other human rights. Consideration should be given to whether an instrument on the right to fair trial might include a provision excluding evidence obtained by improper means.

57. The process of evaluating the evidence and the circumstances may rest on the inner conviction of the court or upon the burden of proof which the court should consider. An important element of fairness is that the court should not consider evidence or circumstances which have not been presented to the court at trial or which are outside of the material in the record of the proceedings. In some countries a distinction is made between the burden of proof or degree of certainty which the court applies in civil cases and in criminal cases. There are also some countries in which the court is required to explain the reasons for the judgement.

IV. ANALYSIS OF THE ELEMENTS OF A FAIR CRIMINAL TRIAL

58. In order to determine the content of the right to a fair criminal trial this analysis identifies many possible elements of a fair trial. While protections for a fair criminal trial are remarkably similar in the principal international human rights instruments, this analysis explicates each element using whichever wording in the various international human rights instruments is the most protective of the right to a fair trial. If there is a question as to which instrument extends the greatest protection, the language of several provisions are examined. Some elements, however, are not explicitly supported by international human rights instruments, but are found in the practices of several governments.

59. The right to fair criminal trial may be separated into its elements relating to each phase of the criminal proceedings. The trial does not include the arrest, interrogation and treatment during detention, but certain provisions in regard to these stages are relevant to the right to a fair criminal trial. There are also provisions relating to aspects of the criminal trial: notice, hearing, decision by an impartial tribunal, sentencing and punishment. Appeal, pardon, and other remedies are relevant to the trial. Fair trial procedures also apply to proceedings relating to juvenile offenders and other processes.

A. Arrest and interrogation

60. Article 9 (1) of the Covenant on Civil and Political Rights prohibits "arbitrary arrest or detention". The Sub-Commission has previously initiated a thorough study of arbitrary arrest and detention, which identified principles that do not need to be repeated in this context (See "Study on the right of everyone to be free from arbitrary arrest, detention and exile", (E/CN.4/826 and Corr.1 and 2, 1964). Article 9 (3) of the Covenant on Civil and Political Rights also provides, "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". The Human Rights Committee in its General Comment on this provision recognizes that more precise time limits are set by states but "delays must not exceed a few days." (CCPR/C/21/Add.1, para. 4, 1982).

61. Article 9 (2) of the Covenant on Civil and Political Rights also protects anyone arrested or detained notwithstanding the nature of the charge. "Anyone who is arrested shall be informed at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

B. Treatment during detention

62. Upon arrest or detention individuals are protected from torture and other cruel, inhuman or degrading treatment or punishment by provisions in the Universal Declaration (art. 5), the Civil and Political Covenant (art. 7), the Convention against Torture (arts. 2-4), the African Charter (art. 5), the American Convention (art. 5), the European Convention (art. 3), and the Geneva Conventions (Common Article 3 and several other provisions).

63. Article 10 (2) of the Civil and Political Covenant contains additional provisions for the treatment of persons detained before trial and for minors:

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

The Human Rights Committee in its General Comments points out that the separation of juveniles from adults in detention is an "unconditional requirement of the Covenant" (CCPR/C/21/Add.1, para. 6, 1982).

64. Article 14 (3) (g) of the Civil and Political Covenant provides that a person shall not be compelled "to testify against himself or to confess guilt". In some countries the accused is afforded the right to remain silent upon arrest or detention and is informed of the right to remain silent and that any evidence obtained by the police may be used against the accused.

65. In some countries the accused must be afforded the right to consult with counsel promptly after arrest or detention and the accused must be informed of this right.

66. In some countries any confession or statement obtained from the accused may not be used against the accused unless the accused has been informed of the right to counsel (including the right to a counsel provided by the government if the accused cannot afford to retain counsel) and the accused has voluntarily waived that right.

C. Notice

67. Article 14 (3) of the Civil and Political Covenant recognizes that an individual charged with a criminal offence has certain "minimum guarantees, in full equality." This guarantee with respect to notice is to "be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him." (art. 14 (3) (a)). Notice is usually provided before trial and may also be considered part of the trial.

68. The Human Rights Committee in its General Comment on this provision indicates "that the right to be informed of the charge 'promptly' requires that information be given as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such." (Official Records of the General Assembly, Thirty-ninth session, Supplement No. 40, paragraph 145, (A/39/40), 1984). The Committee also stipulates that the information be given either orally or in writing and indicates both the law and the alleged facts on which the charge is based.

69. Another "minimum guarantee" is indicated in article 14 (3) (b) of the Civil and Political Covenant which states that the accused must "have adequate time and facilities for the preparation of his defence ...."

70. The Human Rights Committee's General Comments on this provision guarantee "access to documents and other evidence which the accused requires to prepare his case." (Official Records of the General Assembly, Thirty-ninth session, Supplement No. 40, paragraph 144, (A/39/40), 1984).

71. In some countries the accused has the right to see the contents of a file which the government intends to use in pursuing a criminal charge against the accused. In other countries the accused has the right to be informed in a timely fashion of all witnesses and all evidence the government intends to present in proving any criminal charge at trial. The government may be precluded from presenting any evidence not provided in advance to the accused.

D. Counsel

72. Article 14 (3) (b) of the Civil and Political Covenant provides that the accused must be given the right to "have adequate time and facilities ... to communicate with counsel of his own choosing ...."

73. In its General Comments to Article 14 the Human Rights Committee indicates that this provision affords the accused a number of guarantees in regard to the right to counsel including:

(a) The opportunity to engage and communicate with Counsel;

(b) When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer;

(c) Counsel is required to communicate with the accused in conditions giving full respect for the confidentiality of their communications;

(d) Lawyers should be able to counsel and represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter;

(e) "The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair." (Official Records of the General Assembly, Thirty-ninth session, Supplement No. 40, paragraph 145, (A/39/40), 1984).

74. Additional "minimum guarantees" relating to the right to counsel under the Civil and Political Covenant article 14(3)(d) are:

(a) The right of the accused "to defend himself in person or through legal assistance of his own choosing";

(b) "To be informed, if he does not have legal assistance, of this right";

(c) "To have legal assistance assigned to him, in any case where the interests of justice so require, and without payment ... if he does not have sufficient means to pay for it".

75. In regard to cases in which the death penalty may be imposed, ECOSOC resolution 1989/64 of 24 May 1989 provides that a person facing the death penalty should be provided "adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases" (E/1989/INF/7, paras. 127-8; see also ECOSOC Safeguards guaranteeing protection of the rights of those facing the death penalty, ECOSOC resolution 1984/50 of 25 May 1984).

76. In some countries, accused are afforded the right to counsel at every critical stage of criminal proceedings in which the rights and defences of the accused may be asserted, including at the investigatory stage of the proceedings, when the accused is interviewed by the authorities, when the accused is shown to a witness in order to establish an identification, in preparation for trial, at preliminary hearings, at trial, at sentencing, on appeal, and in certain circumstances, during post-conviction proceedings, such as habeas corpus.

77. In some countries, the accused's legal adviser is assured sufficient time to be fully informed of the facts and legal defences applicable to the case; the accused is also assured that the legal adviser is competent to render assistance in the case.

E. Hearing

78. Article 11(1) of the Universal Declaration provides the accused in a criminal case "all the guarantees necessary for his defence".

79. Under the Civil and Political Covenant's "minimum guarantees" provision of article 14(3)(c), the accused has the right "to be tried without undue delay". The Human Rights Committee has stated in its General Comment, "This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered". The trial must proceed without "undue delay" at all stages including the appeal. (Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40, para. 145, (A/39/40), 1984.)

80. Two decisions of the Human Rights Committee have held that a Government had conducted a trial with undue delay in situations in which no meaningful investigation had been undertaken and no charges had been filed for nine months. (A/36/40, paras. 127 (Sequeira v. Uruguay) and 143 (Bouton v. Uruguay), 1981.)

81. The hearing must be public under article 14(1) of the Covenant on Civil and Political Rights: "The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public."

82. As discussed in paragraph 48 above, the Human Rights Committee in its comments on article 14 emphasizes the importance of a public trial and the "exceptional circumstances" which must exist to exclude the public. The Committee maintains that a public hearing cannot exclude members of the press

or limit the attendance to only a particular category of persons. (Official Records of the General Assembly, Thirty-ninth session, Supplement No. 40, para. 144, (A/39/40), 1984.)

83. In some countries the accused is generally assured a public trial in the geographical locality where the conduct at issue occurred.

84. Article 14(3)(e) of the Civil and Political Covenant provides the accused with the right to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

85. It may be implied from article 14(3)(e) that the accused also has the right to present written evidence.

86. Article 14(3)(d) affords the accused the right to "be tried in his presence". In some cases courts must determine before trial whether the accused is mentally competent to understand the nature of the charges and to assist in his/her defence. The Commission on Human Rights is considering the draft body of principles and guarantees for the protection of mentally-ill persons and for the improvement of mental health care (E/CN.4/1990/31) but the present draft does not explicitly deal with this issue.

87. As discussed in paragraph 51 above, the Human Rights Committee indicates that where trials in absentia are exceptionally held for "justified reasons", "strict observance of the rights of the defence is all the more necessary". (Official Records of the General Assembly, Thirty-ninth session, Supplement No. 40, para. 145 (A/39/40), 1984).

88. It may be implied from article 14(3)(d) (right to be present) and Article 14(3)(e) (right to examine adverse witnesses) that even if the accused is not present, the accused should in any case have the right to know all the evidence considered by the tribunal.

89. As discussed in paragraph 52 above, article 14(3)(f) guarantees the right of the accused where she/he does not understand the language of the court to have the free assistance of an interpreter. The Human Rights Committee has observed, "This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals." (Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40, para. 146, (A/39/40), 1984.)

90. Article 14(3)(g) of the Civil and Political Covenant guarantees that the accused cannot "be compelled to testify against himself or to confess guilt".

91. The Human Rights Committee notes that the provision against torture and ill-treatment during detention must be considered in upholding the guarantee not to be compelled to testify against himself or confess guilt. "The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable." (Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40, para. 146, (A/39/40), 1984.)

92. The provisions prohibiting torture in the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment support the Committee's interpretation. As discussed in paragraph 56 above, article 15 of the Convention states, "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

93. In some countries the courts have ruled that no comment may be made nor any inference drawn from the failure of the accused to testify.

94. As discussed in paragraph 56 above, in some countries the courts have refused to permit evidence to be adduced if the evidence has been procured by arbitrary or unlawful interference with the privacy, family, home or correspondence of the accused or if the evidence has otherwise been illegally obtained.

95. As mentioned in paragraph 43 above, article 8 of the Universal Declaration of Human Rights provides, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." From this provision it may be inferred that the accused is assured the right to avail him/herself of each of the legal procedures prescribed by law for hearing the case.

96. In some countries the accused not only has the right not to be compelled to confess guilt, but has the right to a full explanation of all the rights he/she is relinquishing before he/she is permitted to confess guilt.

97. In some countries the accused has the right to enforce any agreement made prior to confessing guilt or the right to withdraw the confession of guilt, if the agreement is not fulfilled.

98. In some countries the court will not accept a confession of guilt unless the court is convinced that there is a sufficient factual basis for the plea.

99. In some countries the court will not accept a confession of guilt unless the accused is informed of the offences charged, the nature of the offences and the potential sentences as well as of the right to counsel, to a public trial, to confront witnesses, to obtain the presence of witnesses, to remain silent, to the presumption of innocence, and to require that proof of guilt be established beyond a reasonable doubt. In those countries the court will not accept a confession of guilt unless the accused voluntarily relinquishes these rights. Also, the accused may withdraw a confession of guilt if the accused does not make a knowing and voluntary relinquishment of these rights.

100. The Human Rights Committee has issued a General Comment on article 14 stating that the provisions in article 14(3) may not include all the rights of an individual in the determination of a criminal charge against him/her. The Committee indicates that these requirements are "minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1 [of article 14]". (Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40, para. 144, (A/39/40), 1984.)

F. Decision

101. As discussed generally in paragraphs 53-54 above, article 14(1) of the Civil and Political Covenant requires that the hearing be held before a "competent, independent and impartial tribunal established by law".

102. More explicit protections for the independence and impartiality of the tribunal have been adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in the Basic Principles on the Independence of the Judiciary. (A/CONF.121/22/Rev.1 paras. 58-59 (1985) endorsed by General Assembly resolution 40/146, Official Records of the General Assembly, Fortieth Session, Supplement No. 53, paras. 154-155, (A/40/53), 1986). Principle 6 states, "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."

103. Principle 10 of the Basic Principles on the Independence of the Judiciary states that persons "selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law". Principle 12 requires that judges "shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists".

104. The Human Rights Committee emphasizes that the "provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14." (Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40, para. 144, (A/39/40), 1984.)

105. In some countries the impartiality and independence of the judiciary is considered to require the separation of the prosecutorial and adjudicative functions, so that a judge may not perform any prosecutorial task.

106. In some countries the accused is guaranteed a trial by jury and in others the accused is tried by lay assessors sitting alone or with one or more judges.

107. Both the Universal Declaration (art. 11) and the Covenant (art. 14(2)) provide everyone the right to be presumed innocent until proved guilty according to law. The Human Rights Committee has explained that during trial the presumption of innocence operates by placing the burden of proof on the prosecution and by giving the accused the benefit of doubt. The Committee has commented, "No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is therefore the duty of all

public authorities to refrain from prejudging the outcome of a trial." (Official Records of the General Assembly, Thirty-ninth session, Supplement No. 40, para. 144, (A/39/40), 1984.)

108. It may be inferred from the presumption of innocence and the requirement of proof beyond a reasonable doubt that the accused is entitled to a judgement based on the evidence adduced at the hearing.

109. In some countries the courts require that the judgement is rational, not arbitrary or capricious; some countries require a statement of reasons to be given to explain the judgement at least in cases in which the judgement is rendered by a judge.

110. Article 14(7) of the Civil and Political Covenant provides that a person may not be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law.

111. The Civil and Political Covenant (art. 15(1)) and the Universal Declaration (art. 11(2)) declare that individuals cannot be held guilty under ex post facto laws. Nor shall a more severe penalty be imposed than the one that was applicable at the time when the criminal offence was committed. The Covenant recognizes the right to benefit by a provision in the law which imposes a lighter penalty.

112. Article 11 of the Civil and Political Covenant states, "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation."

G. Sentencing and Punishment

113. Article 14(1) of the Covenant on Civil and Political Rights provides that the judgement rendered in a criminal case shall be made public except where the interest of juvenile persons otherwise requires.

114. Article 33 of the Fourth Geneva Convention forbids the imposition of collective punishments upon civilians in occupied territories and article 7 of the African Convention states, "Punishment is personal and can be imposed only on the offender."

115. Use of the death penalty is limited under the provisions of the Covenant on Civil and Political Rights, the African Charter, the American Convention, and the European Convention. The provisions in article 6(2) of the Covenant permit the death penalty only when the following conditions apply:

(a) The death sentence may be imposed only for the most serious crimes according to the law in force at the time the crime was committed;

(b) Must be carried out pursuant to a final judgement of a competent court.

It should be noted that the above provisions are not derogable. The Human Rights Committee has stated that "most serious crimes" should be read restrictively to mean the death penalty is a "quite exceptional measure". (CCPR/C/21/Add.1, para. 3, 1982.)

116. Additional guarantees in article 6 of the Civil and Political Covenant provide that:

(a) Anyone sentenced to death has the right to seek pardon or commutation of the sentence; (art. 6(4))

(b) The sentence of death shall not be imposed for crimes committed by persons below 18 years of age nor shall it be carried out on pregnant women. (art. 6(5).)

117. Article 4(5) of the American Convention also precludes the execution of persons over 70 years of age.

118. Article 4(3) of the American Convention states that the death penalty cannot be reinstated in a country where it has been abolished.

119. In sentencing and punishment, individuals are protected from torture and other cruel, inhuman or degrading treatment or punishment by provisions in the Universal Declaration, the Civil and Political Covenant, the African Charter, the American and European Conventions, and the Geneva Conventions.

120. Common article 3 of the Geneva Conventions forbids "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture". (See also Fourth Geneva Convention, art. 32.)

121. The Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 1984/22 noted "the existence in various countries of legislation or practices providing for the penalty of amputation"; recalled article 5 of the Universal Declaration of Human Rights which forbids torture or other cruel, inhuman or degrading punishment; and recommended to the Commission on Human Rights to urge Governments, which have such legislation or practices to take appropriate measures to provide for other punishment consonant with article 5. (E/CN.4/1985/3, para. 95, 1986.)

122. Article 10(3) of the Civil and Political Covenant provides for the separation of juvenile offenders and adults and for the treatment of juvenile offenders appropriate to their age and legal status. Article 10(3) also states that punishments shall have as their aim reformation and social rehabilitation of prisoners.

H. Appeal

123. Article 14(5) of the Civil and Political Covenant provides that everyone convicted of a crime shall have the right to his/her conviction and sentence being reviewed by a higher tribunal according to law. The Human Rights Committee notes that "crime" is not meant to confine this guarantee only to the most serious offences. (Official Records of the General Assembly, Thirty-ninth session, Supplement No. 40, para. 146, (A/39/40), 1984).

I. Pardon

124. Article 6(4) of the Civil and Political Covenant provides the right of a person who has been sentenced to death to seek pardon or commutation of the death sentence.

125. In some countries every person who has been convicted of an offence is assured the right to seek pardon or commutation of any sentence.

J. Other remedies

126. Article 14(6) of the Civil and Political Covenant provides that where there has been a miscarriage of justice and a previous conviction has been reversed, the person who has suffered punishment is entitled to compensation if the reversal was not due to the convicted person's own non-disclosure.

127. In addition, article 9(5) of the Covenant provides that anyone arrested or detained unlawfully has the "enforceable right to compensation".

128. As discussed in paragraph 44 above, article 2(3) of the Covenant requires that any person whose rights are violated "shall have an effective remedy". Such a remedy shall be "determined by competent, judicial, administrative or legislative authorities". The "competent authorities shall enforce such remedies when granted".

129. The Concluding Document of the Vienna Follow-Up Meeting of the Conference on Security and Co-operation in Europe indicates that the participants will "ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated". The Concluding Document also defines those remedies including the "right to a fair and public hearing within a reasonable time before an independent and impartial tribunal".

K. Procedures for juvenile offenders

130. Article 14(4) of the Covenant on Civil and Political Rights provides that special procedures be used for juveniles "that will take account of their age and the desirability of promoting their rehabilitation". The Human Rights Committee states that the procedures for juveniles must grant "at least the same guarantees and protections" as provided adults under Article 14. (Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40, para. 146, (A/39/40), 1984.)

131. The United Nations Standard Minimum Rules for the Administration of Justice ("The Beijing Rules"), adopted by General Assembly resolution 40/33 of 29 November 1985, offer a detailed standard of rights for juvenile offenders. Provisions provide for a distinct system to administer juvenile justice: "a set of laws, rules and provisions specifically applicable to juvenile offenders" (Rule 2.3); and the "appropriate scope for discretion ... at all stages of proceedings and at the different levels of juvenile justice administration" (Rule 6.1). The Rules recognize a juvenile's right to "a fair and just trial" (Rule 14.1) and additional rights. These rights include:

(a) The "right to privacy" (8.1);

(b) The immediate notification of a juvenile's parents or guardians or if not possible, notification within the shortest time possible (10.1);

(c) "Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time" (13.1);

(d) "Capital punishment shall not be imposed for any crime committed by juveniles" (17.2);

(e) "Juveniles shall not be subject to corporal punishment" (17.3); and

(f) "Placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period" (19.1).

L. Other processes

132. The Executive Committee of the United Nations High Commissioner for Refugees has recognized "the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum-seekers from unjustified or unduly prolonged detention" and recommended "that detention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review". (United Nations High Commissioner for Refugees Executive Committee Conclusion No. 44 (XXXVII) (1986)).

V. THE RIGHT TO A FAIR TRIAL AS A NON-DEROGABLE RIGHT

133. Under the International Covenant on Civil and Political Rights, the right to a fair trial may be the subject of derogation and therefore the right to a fair trial may be suspended in certain circumstances, such as times of public emergency.

134. Article 4 of the civil and Political Covenant provides that in situations threatening the life of the nation, a Government may suspend most human rights as long as (a) the exigencies of the situation strictly require such a suspension, (b) the suspension does not conflict with the nation's other international obligations and (c) the Government informs the United Nations Secretary-General immediately. The only rights that are not subject to suspension in this situation are those specified in article 4 of the Civil and Political Covenant as protected from derogation. These rights include freedom from discrimination based on race, colour, sex, language, religion, or social origin. The Civil and Political Covenant also does not permit any derogation from the rights to be free from arbitrary killing; torture, or other cruel, inhuman or degrading treatment or punishment; slavery; imprisonment for debt; retroactive penalties; or failure to recognize a person before the law. It should be noted that the right to a fair trial is not included in this provision.

135. Accordingly, in the 88 countries that have ratified the International Covenant on Civil and Political Rights, some of the most important human rights would be protected as non-derogable rights. Such protection would encompass prohibitions against torture, inhuman treatment, and extrajudicial executions. Other rights, however, including the right to a fair trial and freedom from arbitrary arrest and detention, would be subject to derogation in times of public emergency.

136. The Human Rights Committee has observed, "If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14." (Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40, para. 144, (A/39/40), 1984.)

137. Probably at no other time will the right to a fair trial be as important as it is during a time of civil or international conflict. Yet it is precisely at this time that the right to a fair trial becomes vulnerable under article 4 of the International Covenant on Civil and Political Rights.

138. The Convention against Torture does not permit derogation: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." (art. 2(2)) Under this treaty the accused person possesses a non-derogable right to be free from torture at all times during the criminal process, including interrogation, detention, trial, sentencing, and punishment. Accordingly, evidence obtained as a result of torture can never be permitted to be introduced. Also, persons accused of torture are guaranteed fair treatment at all stages of the proceedings under article 7.

139. The African Charter does not contain a provision allowing States to derogate from its obligations under the treaty in times of public emergency. Hence, it appears that derogation would not be permitted under the African Charter. Some commentators have suggested that the African Charter's use of broadly-worded limitation clauses in several provisions made it unnecessary for the African Charter to include the concept of derogation. Article 7 of the African Charter does not, however, contain any limitations:

> 1. Every individual shall have the right to have his cause heard. This comprises:
>
> (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
>
> (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
>
> (c) the right to defence, including the right to be defended by counsel of his choice;
>
> (d) the right to be tried within a reasonable time by an impartial court or tribunal.
>
> 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

140. Article 27 of the American Convention authorizes the suspension of guarantees in "times of war, public danger, or other emergency that threatens the independence or security of" the Government. Article 27, however, does not authorize the suspension of several significant rights including the "right to life" (art. 4), "right to humane treatment" (art. 5), "freedom from ex post facto laws" (art. 9), "or of the judicial guarantees essential for the protection of such rights". Although article 27 does not make article 8 (the right to a fair trial) a non-derogable right, article 27 does extend non-derogable status to "judicial guarantees essential for the protection of such rights" as the right to life, humane treatment, and the other rights identified in article 27. Hence, a certain aspect of the right to a fair trial has been made non-derogable by the American Convention.

141. It is unclear what are the required "judicial guarantees" protected by article 27 as non-derogable, but presumably they include fair trial guarantees included in the American Convention (art. 8) - most of which relate to criminal trials:

(a) The right to a hearing "within a reasonable time, by a competent, independent and impartial tribunal" (art. 8(1));

(b) The "right to be presumed innocent" (8(2));

(c) The right to assistance by a translator or interpreter (8 (2)(a));

(d) "Prior notification in detail to the accused of the charges against him" (8(2)(b));

(e) "adequate time and means for the preparation of his defence" (8(2)(c));

(f) The right to defend himself or assistance of "counsel of his choosing and to communicate freely and privately with his counsel" (8(2)(d));

(g) "The inalienable right to be assisted by counsel provided by the State" (8(2)(e));

(h) The right to examine and obtain appearance of witnesses in court (8(2)(f));

(i) The "right not to be compelled to be a witness against himself or to plead guilty" (8(2)(g));

(j) The "right to appeal the judgement to a higher court" (8(2)(h));

(k) Confession of guilt by the accused must be "made without coercion of any kind" (8(3));

(l) The right not to be subjected to double jeopardy (8(4));

(m) A public trial, except to protect the interests of justice (8(5)).

142. It is also important to note that the Geneva Conventions and the two Additional Protocols assure the right to a fair trial even during periods of armed conflict. For example, article 129 of the Third Geneva Convention relating to the treatment of prisoners of war states, "In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105." Article 105 includes the right to counsel, the calling of witnesses, the services of an interpreter when needed, the advising of these rights in due time before trial, the right to have competent counsel appointed for the accused, necessary time for preparation of the defence, right to consult with counsel, the right to be notified of the particulars of charges, and the right to have observers from the protecting Government present, unless there are exceptional circumstances. Article 130 of the Third Geneva Convention makes "depriving a prisoner of war of the rights of fair and regular trial" a "grave breach". Under these provisions the right to a fair trial appears to be non-derogable at least in times of international armed conflict.

143. As to non-international armed conflicts, Common Article 3 to the four Geneva Conventions prohibits a party to such a conflict from "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples". The judicial guarantees are not specified but are presumably similar to the safeguards identified by article 105 of the Third Geneva Convention.

144. Article 6 of Additional Protocol II to the Geneva Conventions sets forth a number of fair trial rights applicable to non-international armed conflicts as defined in Protocol II:

(a) The right to be informed without delay of the particulars of the offence alleged and the right to all "necessary rights and means of defence";

(b) Individual penal responsibility;

(c) Punishment only on the basis of existing laws and the right to benefit from later laws which may reduce the penalty;

(d) Presumption of innocence;

(e) The accused's right to be present at trial;

(f) The right not to be compelled to testify or confess guilt;

(g) The right to be advised on conviction of rights and available remedies;

(h) The death penalty may not be imposed on persons who are under the age of 18 years at the time of the offence; also pregnant women or mothers of young children may not be executed; and

(i) At the end of hostilities, the authorities shall grant the broadest possible amnesty.

145. Therefore, while the right to a fair trial has not been recognized as a non-derogable right in article 4 of the Covent on Civil and Political Rights, the African Charter, the American Convention and the Geneva Conventions and Protocols indicate that aspects of the right to a fair trial have been accepted as non-derogable.

VI. RECOMMENDATIONS

146. We suggest that the Sub-Commission appoint the present two members to work jointly on a study entitled, "The right to a fair trial: current recognition and measures necessary for its strengthening".

147. The study should review more comprehensively than has been possible in this brief report the standards for a fair trial in international instruments and in the jurisprudence of international bodies, such as the Human Rights Committee, the Inter-American Commission on Human Rights, and the European Commission and Court of Human Rights.

148. It might be appropriate to prepare a questionnaire to be sent to Governments for the purpose of obtaining their views on the considerations expressed in this report with regard to existing international standards concerning a fair trial and the possibility of making the standards more specific or protective of human rights.

149. In light of the views of Governments, it would be desirable to consider the question of preparing a draft declaration on the right to a fair trial.

150. In light of the views of Governments, it would also be desirable to consider ways by which the right to a fair trial might be strengthened, for example, by making the right to a fair trial or certain aspects of the right non-derogable. In that regard the study would consider the elaboration of a Third Optional Protocol to the International Covenant on Civil and Political Rights which would add article 14 (the right to a fair trial provision) to the list of provisions which cannot be derogated in article 4 of the Covenant.

151. Also in light of the views of Governments, it would be desirable, as an alternative, to consider other means of strengthening the implementation of the right to a fair trial. The United Nations and other international bodies have promulgated significant international norms for fair trials, but have not established implementation procedures specifically designed or focused on fair trials. The study may consider, for example, such efforts as the verification of fair trials by international trial observers or other means of strengthening the right to a fair trial.

152. This brief report contains recommendations on various aspects of the right to a fair trial which might be the subject of particular attention in any further study. Those recommendations are found in paragraphs 41, 49, 50, 51, 52, 55 and 56.

153. A preliminary report would be prepared for the forty-third session of the Sub-Commission in the hope that a final report would be submitted for its forty-fourth session.

Annex

I. SELECTED BIBLIOGRAPHY

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THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JURORS AND ASSESSORS AND THE INDEPENDENCE OF LAWYERS

Working paper prepared by Mr. Louis Joinet on means in the area of monitoring by which the Sub-Commission could assist in ensuring respect for the independence of the judiciary and the protection of practising lawyers in accordance with resolution 1989/32 of the Commission on Human Rights

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CONTENTS

		Paragraphs	Page
Introduction		1 - 11	3
Chapter			
I.	CURRENT UNITED NATIONS STANDARD-SETTING AND REPORTING ACTIVITIES	12 - 33	4
	A. The independence of the judiciary	12	4
	1. Basic Principles on the Independence of the Judiciary	13 - 16	4
	2. Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary	17 - 22	5
	3. Report prepared by the Secretary-General on the implementation of the Basic Principles on the Independence of the Judiciary	23 - 26	6
	B. The protection of practising lawyers	27 - 29	7
	C. Basic principles on the role of lawyers	30 - 33	7
II.	VIOLATIONS OF INTERNATIONAL NORMS	34 - 41	8
III.	POSITIVE EXPERIENCES	42 - 43	13
	A. Legislative protections	44 - 45	13
	B. Promotion: training courses, seminars, education	46 - 47	14
	1. Advisory services in the field of human rights	48	14
	2. Crime Prevention Branch	49	14
	3. United Nations institutes	50	14
	4. Non-governmental organizations	51 - 53	14
	C. International intra-professional solidarity	54	15
	1. Interventions	55 - 61	15
	2. Co-ordinated action	62 - 64	16
IV.	CONCLUSIONS	65 - 75	17
V.	RECOMMENDATIONS	76	19

Introduction

1. It is now universally recognized that fundamental rights and liberties can best be preserved in a society where the legal profession and the judiciary enjoy freedom from interference and pressure. Justice requires that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal, in accordance with the principles proclaimed in the Universal Declaration of Human Rights (art. 10), the International Covenant on Civil and Political Rights (art. 14), and other United Nations instruments.

2. By its decision 1980/124, the Economic and Social Council authorized the Sub-Commission to entrust Dr. L.M. Singhvi with the preparation of a report on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers.

3. The Special Rapporteur accordingly submitted preliminary and progress reports on the subject in 1980, 1981 and 1982 (E/CN.4/Sub.2/L.731, E/CN.4/Sub.2/481 and Add.1, and E/CN.4/Sub.2/1982/23). At the thirty-eighth session of the Sub-Commission, he introduced his final report on the subject (E/CN.4/Sub.2/1985/18 and Add.1-6) and drew attention, in particular, to his draft declaration on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers ("the Singhvi draft declaration") (E/CN.4/Sub.2/18/Add.5/Rev.1).

4. Pursuant to Sub-Commission decision 1985/107, the above study was circulated to the members of the Sub-Commission for comments. These comments are contained in document E/CN.4/Sub.2/1987/17, which was submitted to the Sub-Commission at its thirty-ninth session.

5. At the fortieth session of the Sub-Commission, the Special Rapporteur submitted a report containing comments and suggestions on the draft declaration (E/CN.4/Sub.2/1988/20) and a revised version of the draft declaration (E/CN.4/Sub.2/1988/20/Add.1 and Add.1/Corr.1).

6. At its fortieth session, the Sub-Commission, in resolution 1988/25, expressed "its appreciation and thanks to the Special Rapporteur, for the enduring and valuable contribution he made to the legal doctrine relating to the independence of justice, which is one of the primary prerequisites for the promotion and protection of human rights" and referred the Singhvi draft declaration to the Commission on Human Rights for further consideration. It also decided to consider the question of the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers as a separate agenda item at its forty-first session.

7. At its forty-fifth session, the Commission, by resolution 1989/32, invited Governments to take into account the principles set forth in the Singhvi draft declaration in implementing the Basic Principles on the Independence of the Judiciary which had been adopted by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. The Commission further recommended that Governments should provide for the protection of practising lawyers against undue restrictions and pressures in the exercise of their functions.

8. Finally, the Commission welcomed the creation by the Sub-Commission of a separate agenda item on the independence of judges and lawyers, and requested that the Sub-Commission use the agenda item to consider effective means of monitoring the implementation of the Basic Principles on the Independence of the Judiciary and the protection of practising lawyers.

9. At its forty-first session, in 1989, the Sub-Commission, in resolution 1989/22, responded to the Commission's request by inviting: "Mr. Louis Joinet to prepare, without financial implications, a working paper on means in the area of monitoring by which the Sub-Commission could assist in ensuring respect for the independence of the judiciary and the protection of practising lawyers as requested in Commission resolution 1989/32". Significantly, the words "in the area of monitoring" were proposed and added on the floor of the Sub-Commission "to make the mandate clearer" (see E/CN.4/Sub.2/1989/SR.38, para. 78).

10. At its forty-sixth session, the Commission, in resolution 1990/33, "endorsed the Sub-Commission resolution and requested the Sub-Commission to study the working paper with a view to recommending to the Commission any initiatives which could be taken to effectuate the implementation of the Basic Principles on the Independence of the Judiciary and the protection of practising lawyers".

11. Before determining what means the Sub-Commission might use to assist in ensuring respect for the independence of the judiciary and the protection of practising lawyers, it would be useful to review the steps which have already been taken by the United Nations in these domains and to examine the kinds of deviation from international norms which occur, as well as what steps are already being taken to prevent these deviations.

I. CURRENT UNITED NATIONS STANDARD-SETTING AND REPORTING ACTIVITIES

A. The independence of the judiciary

12. The first part of the mandate given to the writer of this paper is to study means by which the Sub-Commission can assist in ensuring respect for the independence of the judiciary.

1. Basic Principles on the Independence of the Judiciary

13. The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan (Italy) from 26 August to 6 September 1985, adopted by consensus "Basic Principles on the Independence of the Judiciary". The Congress documents were endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; the latter which specifically welcomed the Basic Principles and invited Governments "to respect them and to take them into account within the framework of their national legislation and practice" (para. 2).

14. The Basic Principles set forth are principles concerning the independence of the judiciary, freedom of expression and association of judges as well as rules regarding the qualification, selection, training, conditions of service,

tenure, immunity, discipline, suspension and removal of judges. The Basic Principles emphasize that the independence of the judiciary should be guaranteed by the State and enshrined in the Constitution or law of the country.

15. The Basic Principles, general though they are, represent the first intergovernmental standards spelling out the minimum standards of judicial independence and are the acknowledged yardstick by which the international community measures that independence.

16. The Commission on Human Rights called on Governments, when implementing the Basic Principles, to take into account the principles set forth in the draft declaration prepared by Dr. Singhvi.

2. Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary

17. Procedures have already been adopted to promote implementation of the Basic Principles on the Independence of the Judiciary.

18. An international expert meeting on the United Nations and law enforcement, held under the auspices of the United Nations in Baden (Austria) in November 1987, formulated draft procedures for the effective implementation of the Basic Principles on the basis of previous work carried out by the United Nations Social Defence Research Institute, in co-operation with the United Nations Crime Prevention Branch. These Procedures, approved by the Committee on Crime Prevention and Control at its tenth session, in Vienna, from 22 to 31 August 1988, were adopted by the Economic and Social Council on 24 May 1989 in its resolution 1989/60.

19. The Procedures call upon States to "adopt and implement ... the Basic Principles ... in accordance with their constitutional process and domestic practice". They also call on them to widely publicize the Basic Principles, in at least the main or official language or languages of the country and make the text available to all members of the judiciary. The Procedures recommend national and regional seminars and courses on the judiciary and its independence.

20. United Nations reporting procedures for monitoring implementation of the Basic Principles are established. States are asked to inform the Secretary-General every five years of the progress achieved in the implementation of the Basic Principles, including their dissemination, their incorporation into national legislation, the problems faced in their implementation at the national level and assistance that might be needed from the international community.

21. The Secretary-General is requested to prepare independent quinquennial reports to the Committee on Crime Prevention and Control on progress made with respect to the implementation of the Basic Principles, on the basis of the information received from Governments, as well as other information available within the United Nations system. The Procedures provide that in preparing these reports "the Secretary-General shall also enlist the co-operation of specialized agencies and the relevant intergovernmental organizations and

non-governmental organizations, in particular professional associations of judges and lawyers, in consultative status with the Economic and Social Council, and take into account the information provided by such agencies and organizations". The Secretary-General is requested to widely disseminate the Basic Principles, implementing procedures and the periodic reports on their implementation.

22. The Procedures call on the United Nations to provide technical co-operation to governments requesting assistance in improving their judicial systems and call on all entities within the United Nations system to "become actively involved in the implementation process".

3. Report prepared by the Secretary-General on the implementation of the Basic Principles on the Independence of the Judiciary

23. On the recommendation of the Committee on Crime Prevention and Control, the Economic and Social Council, by its resolution 1986/10 of 21 May 1986 (section V), invited States to inform the Secretary-General every five years, beginning in 1988, of the progress achieved in the implementation of the Basic Principles, including their dissemination, their incorporation into national legislation, the problems faced in their implementation at the national level and assistance that might be needed from the international community, and requested the Secretary-General to report thereon to the Committee on Crime Prevention and Control and the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The General Assembly welcomed this recommendation of the Council by its resolution 41/149 of 4 December 1986 on human rights in the administration of justice.

24. Pursuant to these resolutions, on 31 December 1987 the Secretary-General sent States a note verbale and a questionnaire on the implementation of the Basic Principles. Information was also requested from United Nations institutes on crime prevention and criminal justice as well as from non-governmental organizations in consultative status with the Economic and Social Council.

25. As of September 1989, according to the United Nations Crime Prevention Branch, the following States had replied to the note verbale: Algeria, Argentina, Australia, Austria, the Bahamas, Belgium, Bolivia, Brazil, Burundi, the Byelorussian Soviet Socialist Republic, Cameroon, Canada, Chad, China, German Democratic Republic, Germany, Federal Republic of, Holy See, Honduras, Iraq, Israel, Italy, Jamaica, Japan, Kuwait, Lesotho, Luxembourg, Madagascar, Malta, Mauritius, Mexico, Morocco, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Saint Lucia, Singapore, Spain, Sweden, Switzerland, the United Republic of Tanzania, Thailand, Tunisia, Turkey, Tuvalu, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, the United Kingdom, Uruguay and Yugoslavia.

26. On the basis of the responses of these States, as well as of those of intergovernmental and non-governmental organizations, the Secretary-General will submit a report to the Eighth United Nations Congress.

B. The protection of practising lawyers

27. The second area of concern of this report is the protection of practising lawyers.

28. The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 recognized in its resolution on the role of lawyers that "adequate protection of the rights of citizens requires that all persons have effective access to legal services provided by lawyers who are able to perform effectively their proper role in the defence of those rights, and to counsel and represent their clients in accordance with the law and their established professional standards and judgement without any undue interference from any quarter". It therefore recommended to States that they "provide for protection of practising lawyers against undue restrictions and pressures in the exercise of their functions". This recommendation was repeated verbatim in Commission resolution 1989/32 and Sub-Commission resolution 1989/22.

29. Given the primordial role of lawyers in the defence of the rights of all citizens, it has come to be recognized that governments have a positive duty to protect their security. Thus, Dr. Singhvi noted in his final report that violence and harassment against lawyers "constitute a form of organized intimidation and put fundamental freedoms and human rights in double jeopardy". He therefore concluded that "A lawyer's safety and security must be ensured by the society and neither the State, nor any other authority, nor any individual litigant should be allowed to take any revenge in any form upon the lawyer or members of his family".

C. Basic Principles on the Role of Lawyers

30. The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders requested that the Eighth Congress and its preparatory meetings further consider the issue of the role of lawyers. On the basis of this request, the Committee on Crime Prevention and Control prepared draft basic principles on the role of lawyers. These draft principles were endorsed by the Economic and Social Council for submission to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders which will meet in Havana (Cuba) from August to September 1990.

31. The draft basic principles on the role of lawyers focus special attention on the following issues: provision for effective access to legal assistance for all groups within society; the right of the accused to counsel and legal assistance of their own choosing; the education of the public on the role of lawyers in protecting fundamental rights and liberties; training and qualifications of lawyers, and the prevention of discrimination with respect to entry into the legal profession; the role of Governments, bar associations and other professional associations of lawyers; the right of lawyers to undertake the representation of clients or causes without fear of repression or persecution; and the obligation of lawyers to keep communications with their clients confidential, including the right to refuse to give testimony on such matters.

32. Of particular importance with regard to the protection of practising lawyers are principles 16 and 17, which provide that:

> "16. Governments shall ensure that lawyers ... (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.
>
> 17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities."

33. At its forty-sixth session, the Commission in resolution 1990/33 recommended that the Eighth Congress "consider as a matter of priority the draft basic principles on the role of lawyers elaborated by the Committee on Crime Prevention and Control, with a view to their adoption".

II. VIOLATIONS OF INTERNATIONAL NORMS

34. In his study, Dr. Singhvi correctly noted that the violation of the principle of the independence of justice "is by no means a stray occurrence" (para. 372). Indeed, he listed what he described as 26 "types of deviance" relating to judges and yet another 26 relating to lawyers. Because these occurrences are at the heart of the present study, it is perhaps worth repeating them.

35. Those which affect judges were categorized as follows:

(a) Dismissal, which sometimes involves removal or dismissal of an individual judge for refusal to decide a particular case in a particular manner, and sometimes involves collective removals and dismissals of judges or the abolition of entire courts when they are perceived as obstructing the projects, ambitions or objectives of the executive power. Amendment of laws affecting the tenure of judges so as to permit their dismissal or removal at the discretion of the executive is a related menace to the independence of judges;

(b) Transfer is known to be used either to punish a judge or remove him from a jurisdiction where his independence is considered a problem by the executive. Examples of the latter include the transfer from a criminal to a civil court of a judge who displayed sympathy for an accused belonging to a racial minority, or transfer of a courageous civil libertarian from a court of general jurisdiction to a tax court;

(c) Appointment of judges for a limited term or on an acting or officiating basis, and confirmation of judges in permanent posts and tenures on political considerations;

(d) In countries where promotion or confirmation of judges proceeds by established rules or conventions rather than by exercise of executive discretion, abrogation of rules or conventions for promotion may be considered as a variant of the punitive use of transfers;

(e) Assassination and "disappearance" of judges, although less common than assassination and "disappearance" of lawyers, occurs with sufficient frequency and must be considered as a problem affecting the independence of the judiciary;

(f) Emergency measures occurring during states of exception which deprive the judiciary of its power to consider certain questions of constitutional law, to enforce its decisions or to try certain categories of cases and to curb and curtail the judicial function seriously impinge on the independence of judges. In some cases these aspects of their jurisdiction simply cease to exist, while in other cases they are transferred to military courts or other specially constituted courts whose partiality and whose lack of independence, juridical knowledge and experience is alarming. Sometimes these measures are taken without any formal promulgation of emergency;

(g) Adverse publicity, embarrassing accusations in public, and populist pressures to deflect the judiciary from its appointed role and to discredit it;

(h) Indirect and/or selective executive patronage;

(i) Inducement of extrajudicial assignments or important judicial assignments in the gift of the executive;

(j) Systematic denial of adequate budgets and support staff, denial of autonomy in internal administration, and inadequate pay, pension and other benefits and perquisites in the context of other comparable positions;

(k) Appointment of judges without reference to their integrity and ability or on a discriminatory basis or by denial of equal access to certain sections of the people;

(l) Exclusion of the judiciary from the process of making judicial appointments and lack of consultation with the judiciary or studied inattention to judicial advice in matters concerning the judiciary;

(m) Promotion of judges on the basis of extraneous considerations and neglect of ability and integrity in matters of judicial promotions;

(n) Use of temporary, ad hoc, part-time tenures by the executive to subject the judiciary to a psychosis of fear;

(o) Promise or expectation of post-retirement employment by the executive or by individuals, business firms and large corporations;

(p) Fear of vexatious, criminal, civil or disciplinary proceedings, particularly if the power to initiate or authorize such proceedings is not vested in the judiciary;

(q) Suspension or abrogation of the rights of the citizens, ouster of jurisdiction by reorganization of judicial functions, and vesting essentially judicial functions in non-judicial bodies;

(r) Denial of social status by according lower precedence and generally adopting a less than respectful and courteous attitude towards the judiciary;

(s) Intemperate and ill-informed attacks by influential members of the executive or the legislature or by other official persons against the judiciary in parliamentary and other official fora and in mass media; electoral invective and retribution; partisan attacks by political parties;

(t) Questionable life styles of judges which provide grist for the gossip mill bringing the judiciary into disrepute;

(u) Private disputes of judges or excessive zeal of judges in prosecuting their own cases;

(v) Lack of restraint in making public pronouncements or the failure to observe the obligation of reserve; or overbearing behaviour; rudeness in court or outside;

(w) Unwillingness of a judge to withdraw from a borderline case involving incompatibility or possible conflict of interest;

(x) Membership of judges in organizations or movements which may go beyond good taste or accepted public morals or which may be committed to questionable aims or involved in objectionable activities or their association with such organizations;

(y) Senility and other forms of incipient or advanced incapacity;

(z) Judicial misbehaviour in the form of corruption, bribery, gross and palpable denial of justice.

36. Those affecting lawyers were said to be:

(a) Suspension or abolition of the Bar association or an official ban on the Bar association or curtailment of their functions;

(b) Denial of the right of freedom of association, assembly, thought, speech, expression and movement to lawyers and organizations of the legal profession;

(c) Punitive action against the leaders of the Bar and making examples of them in order to subdue the legal profession as a whole;

(d) Undermining the organization and leadership of the Bar from within and from outside, officially and otherwise;

(e) Disciplinary proceedings, disbarment, suspension from practice or prosecution of lawyers for acts within the proper scope of their professional duties, such as filing complaints about police mistreatment of a client, challenging the impartiality of a judge, challenging the legality of a law or administrative action, or defending the legality of a client's behaviour or statements;

(f) Threats, intimidation, disbarment, suspension from practice, contempt or breach of privilege proceedings, or prosecution of lawyers for statements made in legal proceedings or outside the context of a legal proceeding for criticizing individuals or régimes or proposing changes in the administration of justice;

(g) Selective and motivated prosecution, including raids, searches, seizures and other kinds of harassment, application of administrative sanctions against lawyers known for their defence of civil liberties, political defendants or social groups such as peasants, trade unions, or racial or religious minorities and for offences purportedly and ostensibly unrelated to these activities;

(h) Detention without charge or trial. Although security authorities normally do not offer reasons for such detention, it is often the case that a number of lawyers are detained at the same time and the lawyers selected are known for their activities as defence attorneys or advocates and advisers to opposition groups or disadvantaged of the society. The effect, and presumably the purpose, of such detention is to punish and intimidate lawyers who have demonstrated their willingness to provide such services, and to subdue and suppress the Bar as a whole;

(i) Torture and physical liquidation or "disappearance" of lawyers has been a serious problem in recent years in certain countries. In some cases the reasons for assassination are not known, but in others death threats or subsequent communiqués confirm that legal activities on behalf of certain individuals or groups was the reason. In some countries this has led to the result that no political defendant is able to find an independent and experienced criminal lawyer willing to defend him. Systematic assassination or "disappearance" of lawyers must therefore be considered not only a violation of the individual's right to life and liberty, but also a threat to the independence of the profession and a threat to human rights and fundamental freedoms;

(j) Lawyers are expressly barred from practice for political reasons in a small number of countries. For example, in one country, membership in certain political or professional organizations is considered as proof that the applicant does not support the "basic constitutional order", while in another country lawyers may be barred from practice despite commendable and notable professional records because they have not demonstrated sufficient support for the current political leadership of the country;

(k) Political patronage and preferment by the State and hostile discrimination by the State on political grounds;

(l) Politicization of the profession;

(m) Loss of professional identity;

(n) Decline in professional values and disregard of professional competence.

37. These "types of deviance" are unfortunately widespread today. The Special Rapporteur on Summary or Arbitrary Executions of the Commission on Human Rights, Mr. S. Amos Wako, took note of "a particularly alarming trend, which is rapidly spreading, namely, the practice of death threats deliberately directed, in particular, against persons who play key roles in defending human rights and achieving social and criminal justice in a society (E/CN.4/1990/22, para. 472). He found that death threats are made against persons of various backgrounds and professions, in particular judges, lawyers, magistrates and prosecutors, etc., involved in trials, investigations or other legal proceedings (para. 449).

38. In the report on his visit to Colombia at the invitation of that Government (E/CN.4/1990/22/Add.1), the Special Rapporteur noted that "in recent years, the victims [of extra-judicial executions] have included a Minister of Justice, an Attorney-General of the nation, various justices of the Supreme Court and High Courts and many judges and judicial officials. A number of Ministers of Justice are reported to have been compelled to resign because of the death threats that hung over them and/or their relatives and some seven or eight judges have had to leave the country for the same reasons. In some cases, as in that of Judge Marta Gonzáles who was investigating the Urabá massacres, the reprisals by the so-called paramilitary groups against the judges even include the killing of some of their relatives. According to Asonal Judicial, the union representing judicial officials, one fifth of the 4,379 judges in Colombia today are under threat of death. In addition, not all the judges who have been threatened can benefit from police protection. However, it is said that when protection is provided it is inadequate, as the case of Judge Diaz Pérez demonstrates. The killing of judges and the lack of police protection led in 1989 to a number of strikes by judges and judicial officials throughout the country".

39. Similarly, in its 1987 report, the Commission's Working Group on Enforced or Involuntary Disappearances noted that "the enforced disappearance of defence lawyers and human rights advocates at the hands of government agents also appears to be on the increase" (E/CN.4/1987/15, para. 122).

40. In August 1989, the Centre for the Independence of Judges and Lawyers presented the Sub-Commission with a report entitled "The Harassment and Persecution of Judges and Lawyers", describing the cases of 145 judges and lawyers who had been harassed, detained or killed between January 1988 and June 1989. The list included 34 judges and lawyers killed, 37 detained and 38 who had been attacked or threatened with violence (E/CN.4/Sub.2/1989/SR.12, para. 46). The Sub-Commission responded in resolution 1989/22 by declaring itself "Disturbed at the continued harassment and persecution of judges and lawyers in many countries".

41. The violations, as Dr. Singhvi's list indicates, are not confined to violence against judges and lawyers, however. In 1989, the Sub-Commission heard from non-governmental organizations alleging that, in Malaysia, the Lord President of the Supreme Court and two of his colleagues were improperly dismissed by closed tribunals in conflict with the Basic Principles on the Independence of the Judiciary (E/CN.4/Sub.2/1989/SR.12, para. 56). It was also alleged that, in Chile, numerous cases which normally would be tried by

civilian courts had been transferred to military courts lacking the requisite impartiality (para. 61). In Liberia, it was asserted, three successive sets of Supreme Court justices had been removed from office at the request of the President in three years. (para. 62).

III. POSITIVE EXPERIENCES

42. In the face of these violations, numerous measures are being taken at different levels all around the world. As Dr. Singhvi said, "The battle of independence has to be fought on many fronts, not once and for all, but every day" (para. 377). The most important fronts, as Dr. Singhvi noted, are the fight to expurge arbitrary authoritarianism and the destruction of the judiciary during states of exception. But deviance, as he recalled, "is not always open and turbulent. It comes creeping in many insidious and subtle ways" (para. 380).

43. Parallel to Dr. Singhvi's reference to a "typology of deviance", it may be appropriate here to refer to a "typology of strengthening measures", some of which are described below.

A. Legislative protections

44. The Basic Principles on the Independence of the Judiciary set forth a series of measures which States can take to provide the legal and practical framework for the independence of the judiciary. These include: a constitutional guarantee of judicial independence; assuring that the judiciary has jurisdiction over all issues of a judicial nature and the authority to decide which issues are within its competence; trials by ordinary courts using established legal procedures; the provision of adequate resources to the judiciary; freedom of association and expression of judges; methods of appointment and promotion which ensure integrity and safeguard independence; guaranteeing adequate conditions of service; assuring a guaranteed tenure for judges; providing that judges may only be disciplined or removed for incapacity or misbehaviour in accordance with established standards of judicial conduct and only after a fair hearing, etc.

45. Many States have gone further than these basic steps in protecting judicial independence. Some countries, for instance, such as Costa Rica, Guatemala, Honduras, Panama and Peru, guarantee in their Constitution that the judiciary receive a fixed percentage of the Government's budget. This is said to reduce financial independence on the executive. Others attempt to protect individual judicial independence by providing that a judge's compensation may not be diminished during his term of office. Some countries require judges to write reasoned opinions explaining their decisions as a method of protecting the integrity of the decision-making process. Others provide in their Constitutions that judges may not be transferred against their will. At the 1989 session of the Sub-Commission, Mr. van Boven emphasized various measures to avoid political interference in judicial appointments, including allowing members of the Bar to submit nominations and having nominees screened by a judicial and Bar Council (E/CN.4/Sub.2/1989/SR.12, para. 79). Mr. Fix-Zamudio suggested better education for judges (para. 33).

B. Promotion: training courses, seminars, education

46. The Procedures for the effective Implementation of the Basic Principles on the Independence of the Judiciary call on States to "promote or encourage seminars and courses at the national and regional levels on the role of the judiciary in society and the necessity for its independence".

47. Many States appear to be organizing such courses. Here we will look at the work being done on an international level. A more complete examination of this work is contained in Picken, "A Review of the UN Advisory and Technical Assistance Programs for Human Rights" in UN Assistance for Human Rights (Rädda Barnen, Swedish Section of the ICJ, 1988).

1. Advisory services in the field of human rights

48. The Centre for Human Rights in Geneva administers a programme of advisory services. The most recent report of the Secretary-General on this programme (E/CN.4/1990/43) lists its activities. It would appear that several, including seminars and the provision of the advisory services of experts, are intended to strengthen the judiciary of the target countries although none appears to focus primarily on the independence of the judiciary or the protection of practising lawyers.

2. Crime Prevention Branch

49. The Criminal Justice and Crime Prevention Branch in Vienna also has an advisory services programme, carried out by the interregional Advisor in Crime Prevention and Criminal Justice. In 1988-1989 the Advisor provided advice in the implementation of the Basic Principles on the Independence of the Judiciary to Argentina, Brazil, Egypt, Malawi, Mauritius, Paraguay and Poland.

3. United Nations institutes

50. United Nations institutes are also active in this area. The United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), for instance, regularly conducts international seminars or training courses for practitioners at all levels of the administration of justice. The United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD) organized a meeting of the Presidents of the Latin American Supreme Courts in December 1988, at which the independence of the judiciary was a key topic.

4. Non-governmental organizations

51. Non-governmental organizations have also taken on this work. In 1986, the Centre for the Independence of Judges and Lawyers began a series of regional seminars at which judges and lawyers were provided with the Basic Principles and other international standards and asked to discuss the extent to which the principles and standards were actually adhered to in their regions. Seminars have now been held in 1986 in San José (Costa Rica) for Central America and the Dominican Republic; in 1986 in Lusaka (Zambia) for

anglophone East Africa; in 1987 in Banjul (Gambia) for anglophone West Africa; in 1987 in Kathmandu (Nepal) for South Asia; in 1988 in Buenos Aires (Argentina) for Argentina, Brazil, Uruguay and Paraguay; in 1988 in Tagaytay City (Philippines) for South-East Asia; and in 1988 in Tobago for the Commonwealth Caribbean.

52. The seminars reportedly provide an opportunity for frank debates and also allow the participants - judges, lawyers, attorneys-general and academics - to work out recommendations for the steps that need to be taken in their regions to further strengthen the independence of the judiciary and the legal profession. Typically, the participants divide into working groups which discuss and formulate recommendations on such topics as courts and society, the judiciary as an independent branch of government, the organization and jurisdiction of the courts, the status and rights of judges and the independence of the legal profession. These recommendations are then discussed and adopted in a plenary of all the participants. A follow-up committee is generally established, consisting of one representative from each country to press for implementation at the national level.

53. The CIJL has also held national seminars in co-operation with the United Nations Advisory Services Programme in Nicaragua (1989), Pakistan (1989) and India (1990) and with local human rights groups in Paraguay (1988) and Peru (1989).

C. International intra-professional solidarity

54. In his study, Dr. Singhvi wrote that "an important factor in ensuring the independence of the legal profession is its sense of solidarity. The profession is able to preserve its dignity, ideals. Sometimes when the independence of the legal profession is besieged within a country and internal protests prove to be of little avail, the solidarity of the international community in general and of the legal profession in other countries of the world can prove to be important factors" (para. 364).

1. Interventions

55. Over the past decade, a number of international bodies have begun to organize interventions by international, regional, national and local bar associations with local authorities in specific cases of harassment or persecution of judges and lawyers. These organizations have come to recognize that it is their professional responsibility to speak out on behalf of colleagues being persecuted at home or abroad and that such interventions are not "political" but are vital if a system of justice based on the rule of law is to be protected.

56. The forerunner of these programmes was that of the CIJL, which has built up a network of hundreds of organizations of judges and lawyers willing to respond to CIJL requests for action. The CIJL intervenes in cases involving harassment, persecution or threats directed against individual judges or lawyers or their associations, as well as more subtle pressures such as the use of transfer to punish a judge for having rendered a decision unfavourable to the Government. In addition, the CIJL intervenes in matters such as amendments to the Constitution or legal codes of a country, affecting the judiciary or bar as a whole.

57. More recently, the International Bar Association (IBA), a federation of 115 bar associations and law societies from 69 countries, themselves representing more than 2.5 million lawyers, has begun to regularly intervene with Governments to protest the harassment or persecution of judges and lawyers, and encourages its member bar associations to do the same. In 1989-1900, the President of the IBA wrote to 14 heads of State to protest the harassment of lawyers. Forty-seven member organizations have appointed members or committees to receive and review IBA protests for their support.

58. In 1987, the New York-based Lawyers Committee for Human Rights launched the "Lawyer-to-Lawyer Network" to involve the legal community of the United States in seeking protection for colleagues abroad. Two or more monthly appeals to its network of 1,300 lawyers and 90 state and local bar associations are designed to inform and mobilize United States lawyers and bar groups to write to government officials on behalf of their colleagues. The appeals are also circulated to members of Congress, diplomats, representatives of the department of State and the news media. In 1989, the Lawyers Committee expanded its network to include foreign lawyers.

59. Over the past year the Committee has issued appeals on behalf of 32 lawyers and related professionals. The Network has generated letters from individuals at more than 48 law firms and other organizations on behalf of these attorneys.

60. Amnesty International, as part of its regular practice of sending "Urgent Agent" appeals to its members to protest the detention of persons considered to be "prisoners of conscience," alerts its lawyers' groups worldwide when the appeal involves a member of the legal profession.

61. Other lawyers groups which regularly intercede on behalf of persecuted colleagues include Magistrats Européens pour la Démocratie et les Libertés, the Bureau de Liaison de Défense des Droits de la Défense de la Conférence des Grands Barreaux d'Europe and the Netherlands Bar Association.

2. Co-ordinated action

62. In addition, interprofessional solidarity can extend to other concrete forms of support.

63. In late 1989, for instance, the head of the Colombian judges' association, Asonal Judicial, was invited to Europe by Magistrats Européens pour la Démocratie et les Libertés to inform European lawyers about the difficult situation which Colombian judges face. He was received by lawyers' associations in Belgium, France, Italy, the Federal Republic of Germany, Netherlands, Portugal and Spain and received material contributions to protect Colombian judges.

64. Another model of co-ordinated action was the July 1988 "International Lawyers Forum" in the Philippines, at which 20 international legal organizations met to develop a common response to the increasing violence and intimidation against human rights lawyers in that country.

IV. CONCLUSIONS

65. Since 1989, the Commission on Human Rights has adopted a double approach:

(a) On the one hand, by using the services of the Crime Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs of the United Nations Office at Vienna and the organs which it services, i.e. the Committee on Crime Prevention and Control and the United Nations Congress on the Prevention of Crime and the Treatment of Offenders;

(b) On the other hand, by addressing itself to technical and political expert bodies in Geneva for monitoring those standards, with particular reference to specific cases and situations.

66. This was the sense of Commission resolution 1989/32, which both:

(a) Transferred the Singhvi draft declaration to the Crime Branch, asking that it be taken into account in completing work on the draft basic principles on the role of lawyers;

(b) Called on the Sub-Commission to consider effective means of monitoring the independence of the judiciary and the protection of practising lawyers.

67. The Commission suggested this dichotomy again in its resolution 1990/33 when it:

(a) Noted with satisfaction that the Committee on Crime Prevention and Control had taken into account the Singhvi draft declaration in completing its work on the basic principles on the role of lawyers, as requested in Commission resolution 1989/32, and recommended that the Eighth United Nations Congress consider, as a matter of priority, the draft basic principles on the role of lawyers, with a view to their adoption;

(b) Endorsed the decision of the Sub-Commission to prepare the current working paper and requested the Sub-Commission to study the working paper with a view to recommending to the Commission any initiatives which could be taken to effectuate the implementation of the Basic Principles on the Independence of the Judiciary and the protection of practising lawyers.

68. In both resolutions, the Commission welcomed the close co-operation between the Centre for Human Rights and the Centre for Social Development and Humanitarian Affairs on matters relating to human rights in the administration of justice.

69. To be consistent, therefore, with the Commission's guidance, the Sub-Commission should leave the areas of standard-setting and reporting to the United Nations Crime Branch and should focus its efforts on monitoring. Indeed, this is the sense of the Sub-Commission's request, in resolution 1989/22, that the present report suggest means "in the area of monitoring" by which it could assist in ensuring respect for the independence of the judiciary and the protection of practising lawyers.

70. The Commission's 1989 and 1990 resolutions should serve to rectify an overlap which had previously existed, at least in the area of standard-setting. As will be recalled, in 1980 the Economic and Social Council authorized Dr. Singhvi to begin his study. In the same year, the Sixth United Nations Congress, in its resolution 16, called on the Committee on Crime Prevention and Control to give priority to "the elaboration of guidelines relating to the independence, selection, professional training and status of judges and prosecutors." By the time Dr. Singhvi had presented his draft declaration on the independence and impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers to the Sub-Commission in 1985, however, the Seventh United Nations Congress was approving the Basic Principles on the Independence of the Judiciary which had been prepared by the Committee on Crime Prevention and Control, thus somewhat duplicating the principles elaborated by Dr. Singhvi. The Commission, at its forty-fifth session, in 1989, resolved this duplication by calling on States to take into account Dr. Singhvi's detailed principles on the judiciary in implementing the more general Basic Principles on the Independence of the Judiciary and asking the Committee and the Congress to take Dr. Singhvi's principles on lawyers into account in completing its elaboration of the basic principles on the role of lawyers.

71. It can be seen that current United Nations activity relating to standard-setting and reporting is now carried out through the Crime Branch and the organs it services and that the standard-setting task is well underway. The Basic Principles on the Independence of the Judiciary, adopted in 1985, will most likely be matched later this year by approval of the basic principles on the role of lawyers. These general documents are complemented by the more detailed draft declaration on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers prepared by Dr. Singhvi.

72. It will also be seen in the above survey that violations of international norms are widespread, as are the means being employed to prevent or combat these violations. Many States have implemented constitutional, legislative and practical protection. A future report might examine types of legislation and other measures which have been taken and their practical effect on judicial independence, and might propose other measures for States to consider.

73. Another principal means of strengthening the independence of judges and lawyers consists of promotional activities such as training courses, seminars and other forms of education. The United Nations Centre for Human Rights, the Centre for Social Development and Humanitarian Affairs and various regional United Nations institutes are providing advisory services and technical co-operation in helping countries strengthen the independence of the judiciary. It might be useful for the Sub-Commission to examine the methodology, practice and resources of these different programmes, propose means by which the co-operation between them could be enhanced and also set forth guidelines and criteria to be taken into account in the provision of these services.

74. The element missing from the above activities is international monitoring (contrôle).

75. As regards the judiciary, as recalled by the Commission in its resolution 1990/33, the Committee on Crime Prevention and Control has established, through the Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, a system of quinquennial reporting on the implementation of the Basic Principles. However, this system must, by its nature, be limited to collecting reports provided be those States which respond, as well as reports provided by other sources. It cannot exercise a true monitoring function, nor can it bring to the attention of the international community cases in which legislative or practical measures have served to strengthen the independence of the judiciary (and the protection of practising lawyers) or, on the contrary, measures or situations which constitute extreme violations of these principles.

V. RECOMMENDATIONS

76. This paper was commissioned in order to recommend "means in the area of monitoring by which the Sub-Commission could assist in ensuring respect for the independence of the judiciary and the protection of practising lawyers, as requested in Commission resolution 1989/32." It is recommended that the Sub-Commission ask one of its members to prepare a report which would:

(a) Make a system-wide analysis of the advisory service and technical assistance programmes of the United Nations as regards the independence of the judiciary and the protection of practising lawyers, propose means by which the co-operation between the programmes could be enhanced and set forth guidelines and criteria to be taken account in the provision of these services;

(b) Bring to the attention of the Sub-Commission cases in which legislative or practical measures have served to strengthen the independence of the judiciary and the protection of practising lawyers or, on the contrary, measures or situations which constitute extreme violations of these norms.